THE

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## Supreme Court of Judicature.

CASES DETERMINED IN THE

## QUEEN'S BENCH DIVISION

AND ON APPEAL THEREFROM IN THE

## COURT OF APPEAL,

DECISIONS ON

## CROWN CASES RESERVED,

AND DECISIONS OF THE

## RAILWAY AND CANAL COMMISSION.

EDITOR—A. P. STONE, *Barrister-at-Law.*

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# JUDGES

OF

# THE COURT OF APPEAL.

LIII & LIV VICTORIÆ.

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Lord HALSBURY, Lord Chancellor.

Lord COLERIDGE, Lord Chief Justice of England.

LORD ESHER, Master of the Rolls.

Sir JAMES HANNEN, President of the Probate, Divorce, and Admiralty Division.

Sir HENRY COTTON,
Sir NATHANIEL LINDLEY,
Sir CHARLES S. C. BOWEN,
Sir EDWARD FRY,
Sir HENRY CHARLES LOPES,
} Ordinary Judges of Court of Appeal.

# JUDGES

OF

# THE QUEEN'S BENCH DIVISION

OF

## THE HIGH COURT OF JUSTICE.

LIII & LIV VICTORIÆ.

---

The Right Hon. JOHN DUKE, Lord COLERIDGE, Lord Chief Justice of England, President.
The Hon. GEORGE DENMAN.
The Hon. Sir CHARLES EDWARD POLLOCK, Knt.
The Hon. Sir JOHN WALTER HUDDLESTON, Knt.
The Hon. Sir HENRY HAWKINS, Knt.
The Hon. Sir JAMES FITZJAMES STEPHEN, Knt.
The Hon. Sir JAMES CHARLES MATHEW, Knt.
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The Hon. Sir ARTHUR CHARLES, Knt.
The Hon. Sir ROLAND VAUGHAN WILLIAMS, Knt.
The Hon. Sir JOHN COMPTON LAWRANCE, Knt.

ATTORNEY-GENERAL:

Sir RICHARD E. WEBSTER, Knt.

SOLICITOR-GENERAL:

Sir EDWARD CLARKE, Knt.

## ERRATA.

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BENGAL SECRETARIAT LIBRARY

# CASES

DETERMINED BY THE

# QUEEN'S BENCH DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

# COURT FOR CROWN CASES RESERVED

AND BY THE

# RAILWAY AND CANAL COMMISSION

## LIII. VICTORIÆ.

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[IN THE COURT OF APPEAL.]

1890
*April* 17.

## MACDOUGALL *v.* KNIGHT.

*Practice—Staying Action—Libel—Second Action for same Publication—Res Judicata—Publication of Part of a Judicial Proceeding.*

The defendant published, in the form of a pamphlet, a report of the judgment delivered in a former action which the plaintiff had brought against him. The pamphlet contained no report of the evidence given at the trial, and there were passages in the judgment reflecting on the plaintiff's conduct. The plaintiff brought an action for libel in respect of such publication, and the jury found that the pamphlet was a fair, accurate, and honest report of the judgment, and was published without malice, and returned a verdict for the defendant. The plaintiff thereupon brought another action for libel in respect of the same publication; but he relied on other defamatory statements in the pamphlet than those set out in the statement of claim in the former action for libel. On an application to dismiss this action as frivolous and vexatious:—

*Held* (reversing the judgment of the Queen's Bench Division), that the questions for the jury in the second action for libel being identical with those decided in the first, a plea of res judicata must succeed, and that the action ought to be stayed as frivolous and vexatious:

*Held*, also, that even if the plaintiff could rely in one action on one part of

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the pamphlet, and in another action on another part, such a course was an abuse of the process of the Court, and the second action should be stayed.

The decision of the Court of Appeal in *Macdougall* v. *Knight* (17 Q. B. D. 636), that a fair and accurate report of the judgment in an action, published bonâ fide and without malice, is privileged, although not accompanied by any report of the evidence given at the trial, discussed and approved.

*Per* Lord Esher, M.R.:—The rule of law is, that the publication, without malice, of an accurate report of what has been said or done in a judicial proceeding in a Court of justice, is a privileged publication, although what is said or done would, but for the privilege, be libellous against an individual, and actionable at his suit, and this is true although what is published purports to be and is a report, not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof and published without malice.

APPEAL of the defendant from an order of the Divisional Court.

The action was for libel, and the defendant applied at chambers for an order striking out the statement of claim and dismissing the action as frivolous and vexatious. The circumstances on which the defendant relied were as follows:—In the year 1884, North, J., delivered judgment in favour of the present defendant and a co-defendant in an action brought against them by the plaintiff in the Chancery Division. The defendants thereupon published and circulated among their customers and friends a pamphlet purporting to be a verbatim report of the judgment of North, J., in which there were passages reflecting on the conduct of the plaintiff. The pamphlet did not contain a report of any of the evidence. The plaintiff brought an action for libel against the present defendant and his co-defendant, and this action was tried before Huddleston, B., and resulted in a verdict and judgment for the defendants.

An application for a new trial was refused by a Divisional Court, and came by way of appeal before the Court of Appeal (see *Macdougall* v. *Knight*). (1) The appeal was dismissed, and the decision of the Court of Appeal was affirmed, though on different grounds, in the House of Lords (see *Macdougall* v. *Knight*). (2)

Immediately after the last-mentioned judgment, the plaintiff commenced a fresh action against the defendant, whose co-defend-

(1) 17 Q. B. D. 636. (2) 14 App. Cas. 194.

ant had in the meantime died. This action was founded, like the former one, on the publication of the pamphlet containing the judgment of North, J. In this second action the plaintiff, in the first paragraph of the statement of claim, complained that the pamphlet was a libel and contained defamatory statements, and in the remainder of the statement of claim he gave particulars of the defamatory statements. It is not necessary to particularise the differences between the statements of claim in the two actions; it is sufficient to say that, in the second, passages from the pamphlet were set out as being defamatory which had not been set out in the statement of claim in the first action. Under these circumstances the defendant applied to strike out the statement of claim and dismiss this action, and an order to that effect was made by the master, and confirmed by the judge at chambers. On appeal to the Divisional Court, Lord Coleridge, C.J., and Mathew, J., made an order that, if the plaintiff paid within one week the balance of costs due from him on the appeal to the House of Lords in the former action, then the appeal should be allowed, and the stay removed; but if the costs were not paid within one week, then the action should be stayed until such costs were paid.

The defendant appealed.

*Sir E. Clarke, S.G.*, and *Blake Odgers*, for the defendant. The action is vexatious, and ought to be stayed or dismissed in the exercise of the general jurisdiction of the Court to prevent abuse of its process; for the plaintiff is really suing upon the same cause of action as in the former action. If it is contended for the plaintiff that, from the course which the former action took, the question whether the pamphlet was a true report of judicial proceedings, as distinguished from a true report of the judgment, was never determined, the answer is, that the defendant ought not to be harassed by a second action because the plaintiff did not raise the proper point in the first action, the cause of action being substantially the same.

[LORD ESHER, M.R. If the publication of the judgment alone was privileged, as the Court of Appeal held in the former action, this question does not arise.]

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It is also contended for the plaintiff that the causes of action are not the same, because the statements complained of in the statement of claim in the present action are not the same as those complained of in the former action, although contained in the same pamphlet. But the whole of the pamphlet was charged as a libel in the first action, and the plaintiff gave particulars of the parts he was going to rely upon at the trial as libellous, and he cannot now set out other parts as being libels which he might have relied on as particulars in the former action; he cannot be allowed to split up the libel and to bring successive actions on different parts of it, any more than a passenger injured in a railway accident could sue for injuries to his leg, and bring a second action for injuries to his arm. The real question is the same in both actions—the malicious publication of the pamphlet —and the questions for the jury would be identically the same in the two actions.

No doubt it must be clear that the matter is res judicata before a second action can be dismissed as frivolous and vexatious; but that is clear in the present case. Even where the second action is brought upon new facts discovered after the first action, it has been held by Lord Cairns, in *Phosphate Sewage Co* v. *Molleson* (1), that in order to avoid a defence of res judicata the plaintiff must shew that the new facts upon which he relies entirely change the aspect of the case, and could not by reasonable diligence have been ascertained by him before; a fortiori, a plaintiff cannot bring a second action because he wishes to determine a point of law, the facts being all in the knowledge of the plaintiff at the time he brought the first action. Assuming the defendant to be entitled to an order of some kind, the Divisional Court has wrongly exercised its discretion by imposing terms instead of dismissing the action, and this Court will make the order which the Divisional Court should have made: *Metropolitan Bank* v. *Pooley*. (2) [They cited *Willis* v. *Earl Beauchamp* (3); *Darley Main Colliery Co.* v. *Mitchell* (4); *Brunsden* v. *Humphrey* (5);

(1) 4 App. Cas. 801, at p. 814.
(2) 10 App. Cas. 210.
(3) 11 P. D. 59.
(4) 11 App. Cas. 127.
(5) 14 Q. B. D. 141.

*Lawrance* v. *Lord Norreys* (1); *Reichel* v. *Magrath* (2); *Milissich* v. *Lloyds.* (3)

*Oswald*, for the plaintiff. The order of the Divisional Court is right, and is in accordance with the usual practice to stay an action until the costs of a former unsuccessful action between the same parties have been paid. In the present case the real question is, whether the publication of the judgment of a judge, under the circumstances of this particular case, is actionable, although the publication was made honestly, correctly, and without malice; this point was not raised, or at any rate not decided, in the former action; in other words, there has been no decision whether the occasion was privileged. Again, the actions are not the same, for the libels charged in them are different; the pamphlet contains several distinct libels, each giving rise to a cause of action, and is not merely a single libel containing several instances of defamatory statements which the plaintiff ought to have relied upon as particulars in his first action. The question of res judicata does not arise; the limitations of that defence are laid down in *Langmead* v. *Maple* (4), by Willes, J., who says (at p. 270): "The conditions for the exclusion of jurisdiction on the ground of res judicata are, that the same identical matter shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided." In the present case those conditions do not exist, for the libels are not the same, and the point at issue has not been finally decided. Even assuming that the defendant may have a good defence of res judicata, the action should not be summarily dismissed, but the defence should be pleaded; for an action will be summarily dismissed on the ground that it is frivolous and vexatious, and an abuse of the process of the Court only in cases where its continuance could lead to no possible result favourable to the plaintiff, as in *Willis* v. *Earl Beauchamp* (5) and *Lawrance* v. *Lord Norreys.* (1) That is not the case here, and the discretion of the Divisional Court as to the form of order ought not to be interfered with.

(1) 39 Ch. D. 213.
(2) 14 App. Cas. 665.
(3) 46 L. J. (Q. B.) 404.
(4) 18 C. B. (N S.) 255.
(5) 11 P. D. 59.

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MACDOUGALL v. KNIGHT

*Blake Odgers*, in reply.

LORD ESHER, M.R. In this case the plaintiff has brought an action against the defendant for libel, and the libel of which he complains is the publication of a report, purporting to be an accurate one, of a judgment delivered by North, J., in an action between the same parties, in which judgment there were reflections on the conduct of the plaintiff. The defendant has taken out a summons to stay the present action as frivolous and vexatious. The ground of the application is that a previous action had been brought by the plaintiff against the defendant for libel in publishing this same report, and he alleges that if this action is allowed to proceed a plea of res judicata must be put on the record, and must under the circumstances be successful; so that to allow this action to go on can lead to no result favourable to the plaintiff, but can only cause unnecessary vexation to the defendant, and a waste of time and money. The defendant alleges, that if that is the case it is obvious that the action is frivolous and vexatious, and that, therefore, it is the duty of the Court to stay it. He says further, that even if the plea of res judicata cannot be maintained, yet that what the plaintiff is now doing in bringing this action is frivolous and vexatious on another ground because the former action was brought for the publication of the judgment, and in that action the plaintiff alleged that the libel was contained in certain parts of that judgment, whereas now he takes the same publication, and relies on other parts of it in support of his action, on the ground that they are other and different libels from those on which the former action was based. In other words, the claim of the plaintiff is that he has a right to pick out certain defamatory statements in the libel, and when he has succeeded on those—for his argument must go to that length—that he may take other defamatory statements in the same document and bring a fresh action on them. It is said in answer to this claim, that such a course is an abuse of the process of the Court, and that no such right can exist.

I will consider this case first irrespective of anything that was said in the House of Lords when the other action was before it. (4)

(1) *Macdougall* v. *Knight*, 14 App. Cas. 194.

That former action was brought in respect of a publication which purported to be only a report of the judgment of North, J., and which did not purport to publish any part of the evidence, and this report was alleged to be accurate and published without malice. Under these circumstances, what were the matters in issue before the Court in that trial? I take the law to be deduced from the holding of the Court in *Lewis* v. *Levy* (1), with regard to the publication of legal proceedings in a Court of law, to be that the publication without malice of an accurate report of what has been said or done in a judicial proceeding in a court of justice is a privileged publication, although what was said or done would, but for the privilege, be libellous against an individual and actionable at his suit, and that this is true although what is published purports to be, and is, a report not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof and published without malice. That was the law laid down and acted on in that case, and approved in this Court in the former action between the plaintiff and defendant, and given effect to in that action. If that is the law, let us see what were the questions which arose in that action. They were, first, was the pamphlet, in fact, a fair, accurate, and honest report of the judgment of North, J.? If it was, the publication was privileged unless there was malice. The second question, therefore, was, whether the report was published without malice. The question left to the jury by the learned judge was: "Was the pamphlet published by the defendants bonâ fide, and with the honest intention of making known the true facts of the case, and in order to protect their reputation and in reasonable self-defence?" These questions were answered in favour of the defendants; a third question in express terms was left, whether there was malice or not, and that was answered in the negative; but it seems to me that, in point of fact, the second and third questions were really the same. (2)

We come now to the present action. It is for libel consisting in this, that the defendant has published a report of the judgment of North, J., which contains statements defamatory of the

(1) E. B. & E. 537; 27 L. J. (Q.B.) 282.
(2) *Macdougall* v. *Knight*, 17 Q. B. D. 636.

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plaintiff. What are the questions in this case? The first is—is the pamphlet a fair, honest, and accurate report of the judgment? If the jury were to say "No" to this question they would contradict the finding in the former action. If they say "Yes," then the second question arises—was there malice? That question has also been determined in the other action; so that we have the questions put in the other action covering the matters in issue in this. If so, how is it possible to say otherwise than that the subject-matter of the two actions is the same, and that the plea of res judicata is an answer to the claim of the plaintiff? It is said that the subject-matter of the two actions is not the same, because the defamation, which is the foundation of one of them, consists of other parts of the judgment than those relied on in the former action; and in support of this view *Brunsden* v. *Humphrey* (1) is relied on. In that case there were two separate admitted legal rights of the plaintiff which were infringed—a personal right and a right to have his property uninjured. These are distinct rights, and the jury cannot, in dealing with one case, consider the damages in the other, for the two cases involve different rights and are affected by distinct rules as to assessing damages. That case does not apply to the present, and it is no authority for holding that if there be an actionable injury to the person one action may be brought for injury to one part of the body and another action for injury to another part. That is not the rule to be derived from the case, and was never intended to be, and it has not been put forward by text-writers, or treated in any subsequent case as following from the decision, and, consequently, that case is no authority in the present one.

I will now consider the case with regard to what has been said in the judgments in the House of Lords in the former action between these parties. The first thing to remark is, that the decision of this Court in *Macdougall* v. *Knight* (2) as to privilege was not overruled in the House of Lords. Further, their Lordships did not express any opinion on any point of law; all that happened was that two learned Lords intimated their desire that

(1) 11 Q. B. D. 712; 14 Q. B. D. 141.
(2) *Macdougall* v. *Knight*, 17 Q. B. D. 636.

it should not be taken that they had expressed any opinion. To speak candidly, I cannot make up my mind what their doubt was. It may be said that what they were considering was this—where an alleged libel is the publication of a report of proceedings in a Court of justice, and it is proved that it is only a report of a judgment or summing-up, even though it purports to be only that, may not the jury be asked whether the report gives an accurate account of all the evidence on which the judgment was founded, or omits something which might shew the reader that the conclusions in the judgment of which the plaintiff complains as defamatory were not warranted by the evidence? If that was the question present to the minds of the learned Lords, I sincerely hope that when the point is argued the doubts may be removed. It would be, it seems to me, against public policy, and contrary to the very ground of the privilege—which is that the publication of what took place is merely a means of putting those who were not present in Court in the position of those who were present. There would be another and a practical difficulty as to what, if this were the rule, the reporter would do. If he reports the judgment, is he bound to plead that what the judge said was true and correct? In making the report he did not allege this, but only held out that the report was an accurate one of the judgment, and that may be true. Yet if the suggestion is upheld, the accuracy of the report would be no justification, and it would be put on the reporter to go further and say that what the judge said was true. That may be the duty of a properly-constituted Court of Appeal, but I do not see how it can be the duty of a reporter; and I must, therefore, follow the ruling of this Court so long as it stands as law, and under that ruling a plea of res judicata must succeed in this action. On that ground I think the action should be stayed; but even if the plaintiff could in law split up the defamatory matter in the report into different causes of action, I think such a course would be vexatious, so that either way I am of opinion the appeal must be allowed and the action stayed.

FRY, L.J. I approach the decision of this case with more than usual anxiety. I am fearful lest we should seem not to give due

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weight to the observations of the Lord Chancellor and of Lord Bramwell in the House of Lords, and I am also anxious to give due weight to the decision of the Divisional Court; still more am I anxious lest we should unduly shut the doors of the Court in the face of litigants. Notwithstanding these anxieties, I have, on consideration, come to the conclusion stated by the Master of the Rolls, that the application of the defendant to strike out the plaintiff's statement of claim and dismiss the action ought to be allowed. The short ground for this application is either that a plea of res judicata, if put on the record, must succeed; or that the proceedings in this action are shewn to be vexatious and an abuse of the process of the Court. In my opinion, the defendant is right in both these contentions. Upon the first ground, *Reichel* v. *Magrath* (1) is in point. In that case the House of Lords decided that it was within the jurisdiction of a Court of justice to prevent a defeated litigant raising the very same question which the Court had decided in another action. The question in the present case turns on whether the former action between these parties was for the same cause of action as that in the case before us. Both actions are for libel contained in a pamphlet, and, therefore, I conclude the cause of action is the same. In my opinion, it is impossible that two actions should be properly brought in respect of the same libel. The injustice of allowing a litigant to select one portion of a libel as the ground for one action and another as the ground for a second action, and so on indefinitely, is obvious. The whole publication would be before the jury in each case, and it would be quite impossible for the jury in each case to separate the damages due to the particular part of the libel relied on in that case from the damages arising from other parts of the libel. I think, therefore, that a plea of res judicata would succeed, and that we are bound to stay the action. Suppose, however, this to be otherwise, still, in such case, I do not hesitate to say that such successive actions in respect of the same libel would be an abuse of the process of the Court, and so, quâcunque viâ, the application should succeed, and the action be stayed.

There I might leave the case but for the great and public

(1) 14 App. Cas. 665.

importance of the question raised in it. In view of this, I feel bound to say that I adhere to the decision of this Court when the former action (1) was before them—that a fair and accurate report of the judgment in an action, published bonâ fide and without malice, is privileged, although not accompanied by any report of the evidence given at the trial. I am aware that two members of the House of Lords have said that they must not be taken to accept that view; but such expressions, however weighty and however much entitled to respect, do not overrule the law as laid down in this Court. I desire also to say that nothing that has been urged in the course of the argument in the present case has raised any doubt in my mind as to the correctness of the decision in the former case. Bowen, L.J., put the point clearly and precisely, and I will read what he said as embodying my own view: "I am satisfied myself that the judgment of a judge of the land is in itself an act of such a public and distinct character as to make it to the interest of the commonwealth that they should know it in toto, and provided it is either given verbatim correctly, or correctly summarised, it seems to me that the public policy requires that to be the law, and I have no hesitation in saying that I believe that to be the law at the present day." (2) In coming to that conclusion we are arriving at a decision in accordance with the ordinary practice of the public press, with the usages of society, and with the convenience of Her Majesty's subjects. It appears to me that it would be to put an undue fetter on the press to hold that the publication of a judgment is not privileged unless the judgment fairly summarises the evidence. I cannot doubt that the judgments of Courts must be presumed to be fair, accurate, and adequate, and to make the person who reports such a judgment prove that it is so would be to put on him a burden inconsistent with the interest of the commonwealth. I desire to refer to two other matters. The first is, that in arriving at the conclusion that we have come to, we can hardly be said to disagree with the Divisional Court, as the counsel for the

(1) *Macdougall* v. *Knight*, 17 Q. B. D. 636.

(2) From the print of the judgments of the Court of Appeal in the appendix to the case in the House of Lords.

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defendant did not insist on fully arguing out the case there. The other matter is, that the view we have taken is in agreement with the decision in *Allbutt* v. *General Council of Medical Education and Registration.* (1) If, as was there held, the publication of the minutes of the Council containing a report of their proceedings without the evidence on which they acted was privileged, it appears to be impossible to say that the publication in this case of the judgment of North, J., was not also privileged. I think, therefore, the appeal must be allowed.

LOPES, L.J. I agree with the judgments that have been delivered, but I will shortly express my view. There is no decision in the House of Lords which impeaches the law as laid down in this Court in the previous action between the present litigants. There are reservations of opinion by two of the learned lords; but such reservations cannot be taken as in any sense decisions. On the other hand, Lord FitzGerald thus expresses his view (2): "No authority has been brought before your lordships for the assertion that the privilege cannot exist where the publication is a part only of the proceeding. *Lewis* v. *Levy* (3) is directly contrary. Where, as in the case before North, J., the trial had been completed, and the publisher, in his publication, gives only the last scene, i.e., the decision, with the judge's reasons for that decision, he may incur considerable risks, e.g., he may exceed the limits of privilege, and he leaves himself open to the imputation that he has adopted the plan of a partial publication as the vehicle of malice. In the present case the defendants are freed from those dangers by their defence, which is now to be taken as true in all its facts." That is completely in accordance with the law laid down in this Court, which we must take to be correct. What, then, are the questions to go to the jury in this case? They are: "Was the pamphlet a fair, accurate, and honest report of the judgment of Mr. Justice North?" and "Was the defendant actuated by malice?" Those are the questions that have been put and answered in the former

(1) 23 Q. B. D. 400. (2) *Macdougall* v. *Knight*, 14 App. Cas., at p. 207.
(3) E. B. & E. 537.

action, and therefore a plea of res judicata would succeed, and the prosecution of the action could produce no result.

*Appeal allowed.*

Solicitor for plaintiff: *Walter Stocken.*

Solicitors for defendant: *Torr, Janeways, Gribble, & Oddie, for Payne & Fuller, Bath.*

A. M.

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[IN THE COURT OF APPEAL.]

*May* 14.

GEBRUDER NAF *v.* PLOTON.

*Practice—Recovery of Specific Property other than Land—Lien—Security—Payment into Court—Order L., r. 8.*

By Order L., r. 8, where an action is brought to recover specific property other than land, and the defendant does not dispute the plaintiff's title to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a judge may order that the plaintiff be at liberty to pay into Court, to abide the event of the action, "the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it":—

*Held* (affirming the decision of the Queen's Bench Division), that, under rule 8, in order to entitle the plaintiff to an order that the specific property be given up to him, he must pay into Court the whole amount claimed by the defendant, notwithstanding that it exceeded the value of the specific property.

APPEAL from a decision of the Queen's Bench Division (Huddleston, B., and Grantham, J.).

The action was brought to recover certain silk goods, or their value and damages for detaining the same, consigned by the plaintiffs to the defendant as their agent.

The defendant did not dispute the plaintiffs' title to all the goods in his possession claimed by the plaintiffs, but he claimed a lien upon those goods in respect of sums, amounting to 942*l.*, alleged to be due to him from the plaintiffs for commission on sales effected by him for them before he ceased to be their agent. The plaintiffs disputed the amount claimed for commission, and took out a summons for an order, under Order L., r. 8, "that they be at liberty to pay into Court 229*l.*, and such other sum as the

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judge may direct, as security for which the defendant claims to retain the plaintiffs' silk goods referred to in the indorsement of the writ in this action, and any further sum for interest and costs that the judge may direct to abide the event of this action, and that on such payment being made the silk goods above mentioned, or such of them as remain unsold, be given up to the plaintiffs or their solicitors." The defendant admitted that the value of the goods belonging to the plaintiffs in his possession was 656*l.*

Lawrance, J., at chambers, having made an order that, upon payment by the plaintiffs into Court of 942*l.*, all the goods in the defendants' possession should be given up to the plaintiffs or their agents, the plaintiffs appealed to the Divisional Court, and asked that the order of Lawrance, J., might be varied by directing that the goods should be delivered to the plaintiffs upon payment into Court by the plaintiffs of 329*l.*

The Divisional Court dismissed the application, and the plaintiffs appealed.

*R. Henn Collins, Q.C.* (*C. J. Peile*, with him), for the plaintiffs. There is no jurisdiction, under Order L., r. 8, to order the plaintiffs to pay into Court more than the value of the goods in respect of which the defendant claims a lien. The rule assumes that the value of the thing in respect of which the lien is claimed is greater than the sum claimed. The judge's power is to order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, "the amount of money in respect of which the lien or security is claimed," &c. Those words, at least, limit the amount which may be ordered to be paid into Court to the value of the goods. They cannot be a security for the payment of a greater amount than their own value. If the true construction is that the plaintiff must pay into Court the amount, whatever it is, of the defendant's claim, the defendant, by asserting an extravagant claim, might defeat the plaintiffs' right to obtain delivery of the goods, and so defeat the object of the rule.

*Robert Wallace*, (*R. T. Reid, Q.C.*, with him), for the defendant, was not heard.

LORD ESHER, M.R. Rule 8 of Order L. must be construed according to the ordinary meaning of the English language unless there is something in the context which shews that it ought not to be so construed. The words have no idiomatic meaning, and they must therefore be construed according to their grammatical meaning. The rule first speaks of an action to recover specific property, and goes on to provide, that where "the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same"—that is, the specific property—"but claims to retain the property"—that, again, is the specific property, and up to that point the rule has dwelt only with the plaintiffs' claim against the defendant—"by virtue of a lien or otherwise as security for any sum of money" —there the rule speaks for the first time about a claim which the party from whom the specific property is sought to be recovered may have against the party seeking to recover the specific property—"the Court or a judge . . . may order that the party claiming to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed"—that, again, refers not to the plaintiff's but the defendant's claim—"and such further sum (if any) for interest . . . as the Court or a judge may direct." The interest which may be ordered to be paid must be interest upon the sum claimed by the defendant. I think that the meaning of the words used in the rule is plain. The order can only be made that the plaintiffs be at liberty to pay into Court, to abide the event of the action, the amount of the money claimed by the defendant in respect of which sum he claims to have a lien upon the goods. It is no answer to this construction of the rule to say that it may produce an extraordinary or harsh result in a particular case. I desire to add that our construction of the rule does not prevent the Court from considering the matter, if it be satisfied that the party from whom the specific property is sought to be recovered is making a fraudulent claim in order to defeat the true object of the rule.

FRY, L.J. I am of the same opinion. I think the words of the rule, "the amount of money in respect of which the lien

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or security is claimed," mean "the amount of money *for* which the lien or security is claimed." Counsel for the appellants invite us to construe the rule as if after the words, "the amount of money in respect of which the lien or security is claimed," the words "or the value of the goods, whichever shall be the least," had been inserted. I cannot get that meaning out of the words of the rule. It takes a case in which the plaintiff claims the goods, and the defendant claims, not the goods, but a sum of money; and I think the rule means that those two things should be taken as they stand. The defendant may be ordered to deliver the goods to the plaintiff upon the plaintiff paying into Court the amount of money claimed by the defendant. It is no answer to say that the defendant may defeat the object of the rule by making an extravagant claim. The rule is intended for the use of reasonable men. It does not intend to invite the decision of the Court. We are not called upon to assess the value of the goods, or to decide upon the validity of the defendant's claim, but to carry out the object of the rule by directing that the goods be delivered to the plaintiff upon his paying into Court the amount of the defendant's claim.

LOPES, L.J. I am of the same opinion. It is to be observed that the rule gives an indulgence to the plaintiff: it is made in his favour. Construing the language according to its ordinary meaning, I am of opinion that the rule means that the plaintiff must pay into Court the amount of the money claimed by the defendant in respect of which he claims a lien upon the goods. There is no suggestion here that the defendant's claim is not made bonâ fide.

*Appeal dismissed.*

Solicitor for plaintiffs: *Francis Howse.*

Solicitors for defendant: *Peckham, Maitland, & Peckham.*

W. A.

[IN THE COURT OF APPEAL.]

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*April* 17.

IN RE A SOLICITOR.

*Solicitor—Misconduct—Bankruptcy—Application to Law Society by Official Receiver—Solicitors' Act,* 1888 (51 & 52 *Vict.* c. 65), *s.* 13—*Rules of January* 31, 1889—*Affidavit—Form—Evidence—Examination in Bankruptcy—Admissibility—Bankruptcy Act,* 1883 (46 & 47 *Vict.* c. 52), *s.* 17.

Under the Solicitors' Act, 1888 (51 & 52 Vict. c. 65), s. 13, and rules, the right to apply to the Committee of the Council of the Incorporated Law Society in respect of the misconduct of a solicitor is not confined to clients or persons injured by such misconduct, but may be exercised by any person who alleges that it has taken place.

So *held* by the Court of Appeal, affirming the decision of the Queen's Bench Division:—

*Held*, also, by the Queen's Bench Division, that on an application under the Solicitors' Act, 1888, s. 13, against a solicitor who has been adjudicated bankrupt the notes of his public examination in bankruptcy signed by him may, by virtue of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17, sub-s. 8, be used in evidence against him.

REPORT of the committee of the Council of the Incorporated Law Society appointed under the Solicitors' Act, 1888 (51 & 52 Vict. c. 65.)

An official receiver in bankruptcy by direction of the Board of Trade made application that the respondent, a solicitor, might be required to answer allegations in an affidavit, and that his name might be struck off the roll, or that he might be suspended from practice, or that such other order might be made as the Court should think right, on the ground that the matters in the affidavit constituted professional misconduct on his part in his capacity of solicitor of the Supreme Court.

The charges made by the affidavit were based entirely upon admissions said to have been made by the solicitor at his public examination, and the official receiver proposed, in support of the application, to adduce in evidence the notes of the solicitor's public examination signed by him, and the proceedings in his bankruptcy. None of the persons alleged to have been injured by the solicitor's conduct were parties to the application, nor did the official receiver propose to call them as witnesses. The application came on for hearing before the committee. Counsel

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appeared for the complainant and for the solicitor. A preliminary objection was then taken on behalf of the respondent, that the official receiver had no locus standi before the committee on the following grounds: first, that the Board of Trade by whose direction he made the application was not charged with the duty of punishing solicitors, nor had the Board authority to direct an official receiver to take proceedings with that object; secondly, that the duties of the official receiver as regards the investigation of the debtor's conduct were defined by s. 69 of the Bankruptcy Act, 1883, and did not include the making of an application to strike the debtor, if a solicitor, off the roll; thirdly, that as the debtor was bound to answer all such questions as the Court might put or allow to be put to him in his public examination, his admissions could not be used as evidence against him in a proceeding of a criminal nature not expressly authorized by the Bankruptcy Act, 1883, and that such admissions were only evidence for the purposes of that Act or of proceedings taken under the authority of that Act. As a similar objection had been taken in other applications made by direction of the Board of Trade, the committee deemed it right to ask for the decision of the Court thereon before hearing the application further.

*Hollams*, for the Incorporated Law Society, submitted the report to the Court.

*Winch, Q.C.* (*E. W. Stock*, with him), for the solicitor. First. The official receiver had no locus standi before the committee. Proceedings to strike a solicitor off the rolls for misconduct towards his client should be taken by the client injured, who must make the usual affidavit; or, if he has died, his representatives must make it. The practice has hitherto invariably been for the Law Society to move this Court against a solicitor on an affidavit of the person aggrieved. That practice is recognized by the rules of January 31, 1889 (W. N., February 9, 1889), made under the Solicitors' Act, 1888, 51 & 52 Vict. c. 65. By rule 1 "an application to the Committee to strike a solicitor off the roll of solicitors . . . must be in writing under the hand of the applicant, and be sent to the Registrar, together with an affidavit by the applicant, stating the matters of fact on which he relies in

support of his application." By Part VI., r. 3, "The forms in the schedule to these rules shall be used in all cases as far as practicable, and shall be valid; but a deviation from those forms shall not by reason only of such deviation render any application, affidavit, or other document or proceedings invalid." In Form V. is the "*Form of affidavit by applicant*," in which he states on oath that "C. D. of , solicitor of the Supreme Court of Judicature in England, has been employed by me in a professional capacity *for the last ten years* (or as the case may be)," &c. The application must be accompanied by such an affidavit, and the official receiver cannot make it. The omission of the allegation of employment would be in contravention of the Form and not a mere "deviation" from it. *In re Cheslyn Hall, a Solicitor* (1), an application against a solicitor, who was a trustee, for misappropriation of the trust funds was made by his co-trustees. The objection was raised on his behalf, that the application was not made by the proper persons. Stuart, V.C., said: "If the persons who appear to complain have no right to do so, the Court would be bound to act on that view of the case which has been presented by the counsel for the respondent," but that the applicants had a right to complain. That decision and the terms of the Rules seem to shew the intention of the Rules that a stranger should not be allowed to proceed against the solicitor. The official receiver is unconcerned in the professional conduct of the solicitor, and s. 69 of the Bankruptcy Act, 1883, prescribing the duties of the official receiver, imposes no duty on him to complain to the Law Society. There is nothing in the Debtors Act, 1869, comprising the misconduct of solicitors amongst the misdemeanours therein specified.

Secondly. The admissions of the debtor in his public examination cannot be used against him before the committee of the Law Society in proceedings which are quasi criminal.

In *Reg.* v. *Scott* (2) the answers of a bankrupt before a bankruptcy commissioner were held to be admissible in evidence on a criminal prosecution against the bankrupt; but as Lord Campbell, C.J., in delivering the judgment of the majority of the Court, expressly said, the questions put to the bankrupt "all

(1) 4 W. R. 686. (2) 25 L. J. (M.C.) 128.

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touched matters relating to his trade, dealings, or estate, and tended to disclose concealment of his goods, money, or debts" .... and "On referring to *Ex parte Cossens* (1) and the other cases upon this point, the result seems to be that a question cannot be put to a bankrupt which does not touch his trade, dealings, or estate, or the direct object of which is to shew that he has committed a criminal act." The bankrupt is compelled to give answers, and therefore they cannot be used in evidence against him.

*M. J. Muir Mackenzie*, for the official receiver. First. It has been the practice of the Court to entertain complaints against solicitors even when the relationship of solicitor and client did not exist between the complainant and the solicitor. *In re Blake* (2) the relationship was that of mortgagor and mortgagee. *In re Hill* (3) the solicitor complained of was a clerk to a firm of solicitors, and not himself employed by the applicant. Before the Solicitors' Act, 1888, it was usual when a solicitor had been convicted of felony for the Incorporated Law Society to move to strike his name off the roll on an affidavit by their secretary: *In re Thompson.* (4) From the Solicitors' Act, 1888 (51 & 52 Vict. c. 65), s. 13, it appears that the application to strike the name of a solicitor off the roll may be made at the instance of the solicitor himself, or of "any other person." That right cannot be restricted by Rules made under the Act. But it is not so restricted. The Forms prescribed in the Rules are only to be used "as far as practicable."

Secondly. By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17, sub-s. 8, the debtor shall be examined upon oath, and the notes of the examination signed by the debtor "may thereafter be used in evidence against him." There is nothing to limit the use of them to cases of offences against the Bankruptcy Act, 1883, or the Debtors Act, 1869 (32 & 33 Vict. c. 62.)

LORD COLERIDGE, C.J. The Solicitors' Act of 1888 introduced to some extent a new practice, because it constituted the committee of the Law Society, as it were, a grand jury to inquire

(1) Buck, 531.
(2) 3 E. & E. 31.
(3) Law Rep. 3 Q. B. 543.
(4) 13 C. B. (N.S.) 288.

into the matters referred to the Law Society, and to report to the High Court; and the High Court is ordered to treat the report as a report of the Master, and upon the receipt of it to proceed to such action as they may think fit. By s. 13, "An application to strike the name of a solicitor off the roll of solicitors (whether at the instance of the solicitor himself or of any other person), or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to and shall be heard by the committee, in accordance with rules to be made under the authority of this Act. . . . . Provided that any person who but for this Act would have been entitled to apply to the Court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply, although the committee is of opinion that there is no primâ facie case of misconduct against the solicitor. . . . ."

It is said, first, that nobody but a client—a person injured—can apply. The cases of *In re Blake* (1) and *In re Hill* (2), seem distinctly to shew, if authority were needed, that there were no such limitations, and that any person, not necessarily a client of a solicitor, might come before the Court, and might, upon proper materials, affect it with notice of the misconduct of one of its officers, and set the Court in motion to deal as it thought right with the officer so brought before it. Such undoubtedly was the former practice, and the decision in *In re Cheslyn Hall* (3) in no way conflicts with it. In that case there were several co-trustees. One of them was alleged to have grossly misconducted himself; and two of the other co-trustees, being themselves solicitors, applied to Stuart, V.C., to strike the solicitor, who was their co-trustee, off the roll. The objection was taken that the applicants had no locus standi, because they were not persons who were themselves injured by the act of the solicitor against whom the proceedings were taken. This case, be it observed, was not one of solicitor and client. A solicitor trustee might, no doubt, by the provisions of the trust, be empowered to act as solicitor for the trust, but he does not

(1) 3 E. & E. 34. (2) Law Rep. 3 Q. B. 543.
(3) 4 W. R. 686.

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appear to have been so in this instance. Stuart, V.C., carefully limiting his language, said that if the applicants had no right to apply, the objection would prevail, but that they were co-trustees with the solicitor, and therefore could hardly be said to be "unconcerned" in the matter. What the Vice-Chancellor would have done, if persons quite unconcerned had made the application, it is unnecessary to discuss, because the case shews (and that is the value of it in this matter) that the right to make an application against a solicitor is not confined to the client who alleges misconduct in respect of himself.

Therefore, down to the time of the passing of the Solicitors' Act of 1888 (51 & 52 Vict. c. 65), it is clear that the right to apprise the Court of the misconduct of a solicitor, or to ask the Court for its interference, was not confined to persons standing in the relation of client to a solicitor against whom they applied. It is plain that s. 13 of the Act does not limit the right to a client who may think himself injured, but provides for an application "at the instance of the solicitor himself"—that is when he wishes to be taken off the roll for some reason which, generally, is creditable to himself—"or of any other person." If it had been intended to limit the right to "any client, or any person injured by the solicitor in his practice as solicitor," some such words would have been used. But the section says nothing of the kind, and uses the most comprehensive language. Therefore the Act of Parliament does not assist the learned counsel in his objection.

Then reliance was placed upon the Rules which deal with "Procedure of, and Reports by Committee under Solicitors' Act, 1888," by which an application to the committee to strike a solicitor off the roll of solicitors, or to require a solicitor to answer allegations contained in an affidavit, must be in writing under the hand of the applicant, and be sent to the registrar, "together with an affidavit by the applicant, stating the matters of fact on which he relies in support of his application." That has been done. The procedure, it is admitted, has been properly instituted. But it is said that the provisions of the Rules shew that, although the applicant is not limited at all in the first part, yet by the terms of Part VI. the only person who can apply

under these Rules is a client. No doubt, the application is to be accompanied by an affidavit, and rule 3 of Part VI. says that "The forms in the schedule to these rules shall be used in all cases as far as practicable, and shall be valid; but a deviation from these forms shall not, by reason only of such deviation, render any application, affidavit, or other document or proceedings invalid." The "Form of affidavit by applicant" is that the applicant makes oath that "C. D., of , solicitor of the Supreme Court of Judicature of England, has been employed by me in his professional capacity" for a certain number of years, and then that he has done certain things. The argument is that, although up to the year 1888, persons other than clients might make this application, and the Act of 1888 allows "any other person" to make it, and the Rules refer to an application by any one, which must be in the statutory form, yet, because Part VI., r. 3, goes on to provide that the forms, as far as practicable, "shall be used," and because in the skeleton form of the affidavit there are words which, I agree, are applicable only to a client, that therefore the authorities empowered to make rules to effectuate the Act of Parliament have, by inadvertence, as it could not have been intentional—for all practical purposes cut down the Act of Parliament, and deprived everybody but clients of that right of application to the Court or the Law Society which heretofore they had,—that is a sufficiently startling proposition. I should think, without the slightest hesitation, that if the Rules and the form of affidavit had such force or meaning, they would be clearly ultra vires, and might be disregarded, because they cannot repeal the Act of Parliament. But I am of opinion that they are free from objection of this kind. The Rules, down to the form of the affidavit, are all consistent with the preservation of the right of the subject as it had been theretofore; the form of the affidavit being, no doubt, inconsistent with it, is by express direction of the Rules to be used only "as far as practicable," and any mistake in form shall not invalidate the substance. It appears to me to be clear that the provisions are all consistent, and that there is no ground whatever for the first point which has been raised.

The second is a point of general importance. It is this, that

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the solicitor has had to make statements which are criminatory of himself, that he ought not to have been asked to make them, that they cannot be used against him, and that, therefore, the examination in bankruptcy, which, of course, was the first thing that the applicant appearing before the Law Society would put in as evidence and rely upon, was not evidence, and could not be looked at as evidence by the committee of the Law Society. That point, in my judgment, also fails. From early time, persons have been obliged to answer questions that criminated them. That obligation was for a long while qualified by the protection given by the rule of law that answers which under particular statutes a man could not refuse to make (although at common law he could do so) should not be used as evidence against him in proceedings founded upon such answers. It will be seen from the judgment in *Ex parte Cossens* (1) that Lord Eldon drew a broad distinction between a man being compelled to answer a question which inferentially criminated him, and a question which in its very terms was intended to make him confess that he had committed a crime, and which the person who put it would not put in any other form than the direct form. Lord Eldon, in 1820, said, in effect, "You have no right to ask a man point blank, 'Have you committed a crime?'" and would not allow that question, although, in his opinion, the man might have been forced to answer a question tending to criminate himself if put in another form. The whole principle underlying his judgment is, that the answer to the question which he would have allowed to be put could have been used against the man in subsequent proceedings. Therefore the great authority of Lord Eldon is invoked in vain in the present case. In *Reg.* v. *Scott* (2) it was maintained by one of the judges that where an Act of Parliament had expressly directed that certain questions should be answered—carrying the law further than Lord Eldon would have allowed it to be carried—it must be taken that, although, undoubtedly, the man must answer the question, yet as it was a principle of law that a man was not bound to criminate himself, his answer would be protected by implication of law, and must not be used against him unless there was an express enactment

(1) Buck, 531. (2) 25 L. J. (M.C.) 128.

enabling it to be so used. It is not for me to say whether that argument was good or bad; but at all events it was unsuccessful, for the other four judges of the Court were of the contrary opinion, and in that case a directly criminatory answer was used against the man, and the conviction was confirmed upon it. The very point is now settled by the Bankruptcy Act, 1888, s. 17, enacting that the debtor shall be examined upon oath, and that it shall be his duty to answer all such questions as the Court may put or allow to be put to him, and that the answers shall be read over and signed by the debtor, and "may thereafter be used as evidence against him." Whether Parliament was aware of *Reg.* v. *Scott* (1), and meant to remove all doubt or ambiguity I know not; but it has done so, because it has in express terms enacted that which, of course, if it had been enacted at the time of *Reg.* v. *Scott* (1) would have taken away from the dissentient judge any ground whatever for his argument. Therefore, it is plain that a bankrupt is bound to answer questions which the Court allows to be put, and that the answers, although they tend to criminate him, may, by the express words of the Act of Parliament, afterwards be read in evidence against him

A further argument was that these questions must be limited to the matter of the bankruptcy. But the words of the Act of Parliament differ from the earlier Acts, because s. 17 says that the debtor shall attend the examination and shall be examined, not only as to his dealings and property, but as to his "conduct." Unless "dealings" and "conduct" mean exactly the same thing, "dealings" are matters which are connected with his bankruptcy, and "conduct" is the man's general conduct; and there seems to be nothing improper or unfair—regard being had to what the bankruptcy law now is and to the administration of it—in saying that a man of good character who becomes a bankrupt may be dealt with by the Court in one way, and that a man of bad character—long antecedent fraud and so forth—may be treated very differently, and the word "conduct" seems to me to be used with great accuracy to enlarge the scope of the inquiry, and to make the general conduct of a bankrupt a part, as it ought to be a part, of the materials which are before the Court when it has to

(1) 25 L. J. (M.C.) 128.

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consider what, upon the whole, is the just way of dealing with the bankrupt after the adjudication proceedings.

I think, therefore, on the second point, for the reasons I have given, the argument for the solicitor equally fails, and that this examination must proceed before the Law Society.

MATHEW, J. I am of the same opinion for the same reasons.

J. R.

The solicitor appealed.

The arguments on the hearing of the appeal were confined to the first point taken by counsel for the solicitor in the Court below—namely, that the application to the Committee of the Council of the Incorporated Law Society could not, under s. 13 of the Solicitors' Act, 1888, and the rules of January 31, 1889, be made by the official receiver, or by anyone who was not a client or person aggrieved by the alleged misconduct of the solicitor.

The same counsel appeared as in the Court below.

LORD ESHER, M.R. It is clear that before the passing of the Solicitors' Act, 1888, anybody who chose to say that a solicitor had been guilty of misconduct could make the application to the Court. Anybody was entitled to inform the Court of the misconduct of one of its officers. The Solicitors' Act does not alter the person who may make the application; it only says that any person who does in fact make it must first go to the Committee of the Council of the Incorporated Law Society. The rules made under the Act have the same effect. It was contended that the Act and rules are restricted by the form of affidavit to be made by the applicant, which is given in the schedule to the rules. I think that the form is only intended to point out the sort of affidavit that should be made. The applicant must proceed according to the rules, and, as an instance of the sort of affidavit he should make, the case of an application by a client is put, but the words, "or as the case may be," which follow in brackets, shew that the application is not meant to be limited to the case of a client. I am therefore of opinion that the form does not derogate from the effect of the Act and rules. But I go further, and say that it was not in the power of the judges to

make a form which should so derogate, and that any such form would be ultrà vires.

This appeal must be dismissed.

FRY, and LOPES, L.JJ., concurred.

*Appeal dismissed.*

Solicitors for the appellants: *Long & Gardiner.*

Solicitor for Incorporated Law Society: *E. W. Williamson.*

Solicitor for official receiver: *The Solicitor of the Board of Trade.*

W. A.

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[IN THE COURT OF APPEAL.]

*May* 13.

IN RE WATSON. EX PARTE OFFICIAL RECEIVER IN BANKRUPTCY.

*Bill of Sale—Bills of Sale Act,* 1878 (41 & 42 *Vict. c.* 31), *s.* 4—*Loan—Fictitious Sale of Personal Chattels—Hiring and Purchase Agreement—Licence to take Possession of Chattels as Security for Debt—Substance of Transaction to be looked at, notwithstanding form.*

A transaction purported to be a sale of personal chattels, followed by a hiring and purchase agreement, whereby the vendor agreed to hire the chattels from the purchaser and to pay quarterly sums as for such hire, until a certain amount was paid, when the chattels were to become again the property of the vendor, and power was given to the purchaser to take possession of the chattels on default in payment. No sale or hiring of the chattels, however, was really intended, the object, in truth, being merely to create a security for a loan of money to the supposed vendor from the supposed purchaser:—

*Held*, that the true nature, not the form of the transaction, must be regarded, and that the supposed hiring and purchase agreement was a bill of sale within the Bills of Sale Acts.

APPEAL from an order of the Divisional Court dismissing an appeal from an order of the County Court of Lancashire.

An application was made in the county court by the official receiver, as trustee in bankruptcy of Mary Watson, a bankrupt, for an order declaring that certain household furniture and effects, which had been seized by one Love, were the property of the official receiver as such trustee.

The facts were, in substance, as follows:—It appeared that, an execution having been put into the bankrupt's house, she had applied to a friend named Barron, stating that she wished to

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obtain money on the security of her furniture. Barron suggested that Love might be willing to lend her money. She shortly afterwards had a letter, stating that Love would call and look at the furniture, which he accordingly did: and he informed her by letter that he was willing to advance 150*l.* On February 6, 1889, a valuer, acting on behalf of Love, came to the bankrupt's house and took an inventory, and made a valuation of the furniture. The following day, February 7, Barron and Love came to the house. Barron produced the inventory and an agreement, in the form commonly known as a hiring and purchase agreement, the purport of which was that Love, as owner of the furniture comprised in the inventory, let, and the bankrupt hired the same, upon the terms that the hirer should pay to the owner a rent of 40*l.* a quarter till the sum of 200*l.* was paid, when the goods were to become the property of the hirer. It was provided by the agreement that, in case the hirer did not duly perform the agreement, the owner might terminate the hiring and take possession of the goods, and for that purpose might enter upon the premises of the hirer; and it was further provided that the hirer might during the hire purchase the furniture by payment in cash of a sum which, with any amounts already paid, should amount to 200*l.* Barron told the bankrupt that he wished her to understand that she was selling the furniture to Love, but that it would be hers again on the repayments of the hire being properly kept up. The bankrupt asked Love whether, if she wished to dispose of the furniture, she could instruct any auctioneer she liked to sell, provided she instructed the auctioneer to pay Love 200*l.*; to which Love replied that she could. Love placed 148*l.* on the table, 2*l.* being deducted to pay for the inventory and valuation. Barron handed the bankrupt a chair with instructions to hand it to Love with some words to the effect that she sold him the furniture, which she did. The bankrupt then signed the hiring agreement. The value of the furniture was over 300*l.* On these facts the official receiver contended that there was no valid sale of the goods to Love; that the transaction was one of loan and security, not a sale; and that the legal title of Love was recorded in the agreement of February 7, 1889, which was, therefore, a bill of sale, and invalid for want of registration.

The county court judge found that, though it was the intention of Love that the transaction should be, so far as form was concerned, one of a sale followed by a hiring agreement, the bankrupt did not intend to part with all her interest in the furniture; that she considered the disposal of her furniture in the manner described, followed by the signing of the hire agreement, as all part and parcel of one transaction, by which she obtained a present advance of 148*l.* upon the security of the furniture, which was to remain in her possession, and which she was at liberty to redeem at any time upon payment to Love of 200*l.*; that the transaction was in fact one of a loan with security, a mortgage, not a sale with a right of repurchase; and that there never was a sale of the furniture to Love which was valid against the bankrupt's creditors. He also found that the only record of Love's title to the goods was the acknowledgment in the hiring agreement that Love was the owner of them, and that it was intended by the bankrupt in signing the agreement that it should be the record of the transaction and of Love's title. Notwithstanding the above findings by him, the county court judge thought that he was bound by the judgment of a Divisional Court (Fry, L.J., and Mathew, J.), in a case of *United* 40*l. Loan Club* v. *Bexton* (1), to decide that the hiring agreement was not a bill of sale; and, therefore, decided accordingly, and dismissed the application. Upon appeal to the Divisional Court (Cave and Lawrance, JJ.), they thought that the authorities being conflicting the case was one for the Court of Appeal. They therefore gave a formal judgment affirming the decision of the county court judge, with leave to appeal.

*Sir E. Clarke, S.G.*, and *Muir Mackenzie*, for the appellant, the official receiver. It being found by the county court judge that there was no real sale of the furniture at all, the result is that the hiring agreement was not really a hiring agreement, but, in substance, a licence to take possession of personal chattels as security for a loan. There is no case which decides that the Court is prevented from looking to the substance and reality of the transaction by the mere form of the document. In the cases

(1) Not reported

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where such an agreement has been held not to be a bill of sale, the Court has come to the conclusion that there was in fact a real sale of the goods previous to it. [They cited, in addition to the cases referred to in the judgments, *Phillips* v. *Gibbons*. (1)]

*A. J. Allen*, for the respondent Love. The county court judge has not found that the transaction of handing over the chair was a sham, so far as the intention to pass the property is concerned. On the contrary, he seems to have thought that, though there was no sale, there was an intention to pass the property by way of mortgage. It is submitted that the legal property in the goods passed to Love by the transaction, even if there was no sale, and that therefore the hiring agreement was in reality a hiring of the goods, not a bill of sale. It is clear that the licence to take possession of the goods contemplated by the 4th section of the Bills of Sale Act, 1878, is a licence by a person who remains owner of them. If the property had really passed to Love, whether by way of sale or mortgage, then there is not such a licence by the owner of the goods; it is only a licence to Love to determine the hire and enter on the hirer's premises to take possession of his own goods. People are entitled to evade the Bills of Sale Act in the sense that, if they can carry out what they want to effect, by means which are not bills of sale within the Act, they are entitled to do so In this case the constructive delivery of the furniture was not a sham, but a device in order to carry out the arrangement without coming within the Act.

[LORD ESHER, M.R. Assuming that there was no sale, where do the terms of the supposed mortgage, as to redemption, payment, &c., appear, if not in the hiring agreement?]

If, in fact, the property was sufficiently passed to Love by parol to enable him really to let the goods, as it is contended that it was, and therefore there was a real hiring agreement, then, if the same effect can be arrived at by such an agreement as would in other cases be produced by the terms of a mortgage, and so the transaction can be carried out without coming within the Bills of Sale Act, such a transaction would be perfectly good.

*Sir E. Clarke, S.G.*, did not reply.

(1) 5 W. R. 527.

LORD ESHER, M.R. In this case the county court judge has found certain facts, and upon those findings he came to a certain conclusion of law. There was an appeal from his decision to the Divisional Court, which gave a formal judgment dismissing the appeal; and the case then came before us on appeal from their decision. Having heard the appeal, it seems to me that the only question of law, which we are called upon to decide, is this, viz., whether, assuming the findings of the county court judge on the questions of fact to be correct, for we have no power to review those findings, it is a true proposition to say that, where the parties have given the transaction, for the purpose of disguising its real nature, a form which is not that of a bill of sale within the Bills of Sale Acts, the Court is precluded from deciding the case according to the real truth and substance of the matter by reason of the form so put forward by way of disguise and for the purpose of preventing the Court from getting at the true facts. The county court judge seems to have thought so. I will do him the justice to say that he hardly seems to agree with the result at which he felt bound to arrive, but he thought the case was concluded by the decisions. Therefore we have to inquire, whether there has been any decision to that effect by a Court which binds us, and, if there has been such a decision by a Court which we have power to review, whether we agree with it. Now, what are the facts, as found by the county court judge? He finds in effect that the bankrupt did not desire to sell the furniture, but she wanted to borrow money on the security of the furniture in order to prevent its being sold in execution. He finds that Love did as a matter of fact lend her money, and was to have some right by way of security over the furniture: so that she never really intended to sell the furniture, and he never intended to buy it. If he intended to buy and pay a price for it, it is impossible to say that he intended to lend money upon the security of it. The two things are inconsistent. If he intended to buy it for the money he gave, the moment he had paid the money he had nothing more to do with the bankrupt: the furniture was his. To say that he really bought this furniture for £150 in this case seems to me impossible; he really intended to lend £150 on condition of being paid £200 in certain

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instalments by way of principal and interest. The fact being, as the county court judge says, that the parties never intended to buy or sell respectively, Love goes to the bankrupt's house with another person; a chair is then put into the bankrupt's hands with instructions to hand it to Love, which she accordingly does, and Love then leaves the house. The county court judge has found, in substance, that this proceeding was a mere form. It was intended, that is to say, that there should be the form of a constructive delivery, as in the case of a purchase and sale; but it is found that there never was a purchase and sale, and therefore the supposed delivery was a mere sham. What really happened was that there was a loan of £150, which was to be repaid with enormous interest, by the payment of £200 by quarterly instalments. Then what was to be the security? The security was, in truth, to be a power to seize the furniture and sell it, if the bankrupt made default in the stipulated payments. Such was the agreement which the parties came to in point of fact. Then what was the evidence of the lender's right to this security? He would really have had no security, unless it were put into a writing. The agreement of February 7 is really the evidence of his security. Without it there would be no evidence of her liability to pay or his right to seize the furniture if she did not pay. What kind of security then is this document? It is at least a licence to take possession of personal chattels. If this is the case of a loan of money secured by a licence to seize the furniture in default of payment, and this document is the evidence of such security, then it is obvious that the document comes within the 4th section of the Bills of Sale Act, 1878. If, however, the transaction amounted to a mortgage of the furniture, then it seems to me that this document would be the evidence substantiating such mortgage, and therefore an assurance of personal chattels, and so either way the document would be within the Bills of Sale Act. The judgment of the county court judge does not appear to deny that this would be so, unless the form of the transaction prevented the Court from giving effect to the truth of the matter. Therefore, the question is, whether it has been decided that we cannot, as my brother Lindley tersely put it in one of the cases, go through the document to get at the truth. In my opinion

the Court ought never to let a sham document, drawn up for the purpose of evading an Act of Parliament, prevent it from getting at the real truth of the matter. Has any case decided the contrary? I do not think so. It has been said that in the case of *United 40l. Loan Club* v. *Bexton* (1) Fry, L.J., and Mathew, J., so decided. I think that what was said in that case has been wholly misconstrued. It was a case of interpleader. Three points were taken for the execution creditors in that case, as appears from the judgment of Fry, L.J. The first was, whether there was any evidence that the transaction was fraudulent within the statute of Elizabeth, and it was decided that there was not. The second point was, whether the property in the goods was really intended to pass to the claimant. So far as that point was concerned, Fry, L.J., seems to have said in substance, it having been argued that the transaction anterior to the hiring agreement was not really a sale out and out, that, whether it was such a sale or merely a mortgage, whichever view was taken of the transaction, it was the intention of the parties that the property should pass; so that point failed. Then the third question was, whether the instrument, which purported to be a hiring and purchase agreement, required registration under the Bills of Sale Acts. As to that, Fry, L.J, said: "It is to be borne in mind that those statutes do not require that any transaction shall be put in writing; they only require that, if a transaction be put in writing and be of a particular character, then that it shall be registered, otherwise it shall be void. When there is a document, the Court has to consider the true nature of the document; and if, on consideration of its true nature, they arrive at the conclusion that it is one of the documents enumerated in the definition clause of the Bills of Sale Act, then it requires registration. An illustration of that class of cases is to be found in *Ex parte Odell* (2), where there were two documents, and the Court came to the conclusion that the true meaning of them was a security, and held that it required registration. In the present case we have only one document, and what we have to inquire is whether that document is one which under the statute requires registration. Now, Mr. Stanger, who argued this case with great ability and clearness, admitted

(1) Not reported. (2) 10 Ch. D. 76.

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that he could not bring the document within any of the descriptions of documents in the definition clause of the Act of 1878. The only one which appeared to me to require any attention was expressed in the words, 'licence to take possession of personal chattels as security for any debt'; but I think Mr. Graham was right when he said that means a licence by the owner of the property to the person who advances the money to take possession of the chattels which remain in the custody of the owner. That is not the nature of this transaction, because the only licence which is to be found in this instrument is a licence to the person who is described as the owner to take possession of his own chattels; the object of that being, no doubt, to justify him in going on property of the person in whose possession the chattels may be. I think, therefore, those words in the Bills of Sale Act do not apply, and, consequently, the instrument does not require registration." It appears that, so far as this point was concerned, the Court came to the conclusion that there was a bonâ fide sale out and out in the first instance, followed by a hiring agreement. All that the case really decides is that, that being so, such a hiring agreement is not within the Bills of Sale Act; it does not decide that, because people put the thing in the form of a hiring agreement, when in truth there is no hiring, and the transaction is merely one of loan and security taken, either by passing the legal property in the chattels, or by giving a licence to seize them on default, the Court cannot hold that the document is a bill of sale, though called a hiring agreement. So much for that case. Then, with regard to what Cave, J., said in *In re Yarrow* (1) as to the contradictory nature of the decisions on this subject, I must say that I think he has misapprehended the decisions, and that they are not contradictory as he supposes. I will take first among the cases to which he has referred the case of *Yorkshire Railway Wagon Co.* v. *Maclure* (2), which was decided by Jessel, M.R., and Lindley and Holker, L.JJ. Was anything laid down in that case to the contrary of what I have said? There certain documents being before the Court, which on the face of them had a certain meaning, they inquired into the real truth of

(1) 61 L. T. (N.S) 642; 59 L. J. (Q B) 18. (2) 21 Ch. D. 309.

the matter, and having ascertained that, decided accordingly. Lindley, L.J., there said in giving judgment, and what he so said was exactly in accordance with the view taken by the late Master of the Rolls: "I understand the view the learned judge took was this, that the transaction of hire was a mere device or cloak to conceal a loan. If that had been the view I took of the facts, I should have come of course to the same conclusion. I should disregard or throw aside the cloak and look at the real transaction alone. But for reasons I will give presently, I am satisfied that the purchase and hire transaction was the real transaction in this sense, that the parties meant it to operate according to its tenor as comprised in the deeds. It was not intended by them as a mere blind or cloak for something behind, it was a transaction substituted for another, but bonâ fide substituted, and intended to be acted upon according to its purport and apparent effect." What he says there is that the Court will inquire into the real facts; but, having done so, they find that the document correctly represents the truth, and is a hiring agreement both in form and substance. Cave, J., says in *In re Yarrow* (1) that the Court in this case had regard to the form and not the substance. That does not appear to me to be so. It is quite right in one sense to have regard to the form. The form of the document is no doubt one of the facts to be looked at, and the fact that it is not in the form of a bill of sale is the first fact that has to be considered, but when, on looking to the other facts, it appears that the form is a mere cloak, this case distinctly shews that it may be thrown aside. Then there is the case of *Manchester, Sheffield, and Lincolnshire Ry. Co.* v *North Central Wagon Co.* (2) Cave, J., has referred to a passage of my brother Cotton's judgment in that case, where he says: "Of course the hiring and letting agreement cannot in itself be a bill of sale, but it may be looked at to see what the nature of the transaction was as regards the second part of the transaction." It is obvious that it may and must be looked at as one fact; but then the Lord Justice proceeds to consider the other facts of the case, and the question whether there was a perfect sale before the hiring transaction,

(1) 61 L. T. (N.S.) 642; 59 L. J. (Q.B.) 18.

(2) 35 Ch. D. 191; 13 App. Cas. 554.

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and he comes to the conclusion that there was, and that, that being so, the hiring agreement was not within the Bills of Sale Act. He says: "Here upon the evidence I think it is made clear that there was a perfect transaction of purchase and sale on February 18 independently of and before these two documents, and before the first of these two documents was in any way asked for:" and again, "Where on the evidence there is a complete contract independently of and previous to the documents, and the documents cannot be looked upon as a memorandum of the agreement, in the sense that they are a record of the transaction, they cannot be, within the fair construction of those words, "other assurances," bills of sale, so as to require registration, or to require to be in the form required by the Act of 1882." There is no pretence for saying that the Court in that case did otherwise than inquire into the actual facts, and act accordingly. Cave, J., says that some members of the House of Lords in that case expressed a similar opinion to that which he attributes to the Court in *Yorkshire Railway Wagon Co.* v. *Maclure.* (1) He says: "The distinction is that there the wagon company had nothing to part with; they had an interest in a hire and purchase agreement, but they had forfeited it, and the owners of the wagons did not chose to enforce the forfeiture, but chose to take a security under the hire and purchase agreement. It is impossible to say that there was any mortgage; still I cannot shut my eyes to the fact that Lord Macnaghten does state that the result would have been the same if the company had been the owners of the wagons." I cannot see that Lord Macnaghten's judgment gives any colour for what the learned judge seems to suppose as to the effect of it. Then I come to the case of *Redhead* v. *Westwood.* (2) The way in which I look at that case is this: if Kay, J., inquired into the real truth of the case, and, having determined it, then proceeded upon that footing to consider the nature of the document in question, I agree with the process which he adopted; but, if he intended to say that either on authority or principle he was precluded by the form of the document from going to the truth of the case, I disagree with him. If the case bears the latter construction, it was in my opinion wrongly decided. With regard

(1) 21 Ch. D. 309. (2) 59 L. T. 293.

to the case of *Gapp* v. *Bond* (1) it seems to me quite in accordance with what I have said in this case It appears to me that the criticisms which Cave, J., applied to the previous decisions in *In re Yarrow* (2) were the result of misapprehension, and that there is no such contradiction between them as he supposes. They all appear to me to be consistent when rightly apprehended, and to agree with the view we take in the present case. I do not deny that people may evade an Act of Parliament if they can, but, if they attempt to do so by putting forward documents which affect to be one thing when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the Court will go through the documents in order to arrive at the truth. So when the transaction is in truth merely a loan transaction, and the lender is to be repaid his loan and to have a security upon the goods, it will be unavailing to cloak the reality of the transaction by a sham purchase and hiring. It will be a question of fact in each case whether there is a real purchase and sale complete before the hiring agreement. If there be such a purchase and sale in fact and afterwards the goods are hired, the case is not within the Bills of Sale Act. The document itself must be looked at as part of the evidence; but it is only part, and the Court must look at the other facts, and ascertain the actual truth of the case. Here it is found as a fact that there was no real transaction of sale: that there was nothing but a loan accompanied by a security given upon the goods, the terms of which are contained in the document in question. That being so, the form of the document does not prevent our looking at the real truth of the case, which is that the document is not really a hiring agreement, but in substance contains the terms of a loan and the security given for it upon personal chattels. The document so regarded is at least a licence to take possession of personal chattels within the Act, and therefore a bill of sale. For these reasons I think the decision of the Court below was wrong and should be overruled.

COTTON, L.J. I can express my view very shortly. The findings of the county court judge appear to me to dispose of

(1) 19 Q. B. D. 200. (2) 61 L. T. (N.S.) 643; 59 L. J. (Q.B.) 18.

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the case. The facts are these. The bankrupt being in want of money, a friend introduced Love to her. He came to her house and then had one of the chairs handed to him by her under the circumstances that have been mentioned; and after that she executed what purported to be a hiring agreement in respect of the furniture. The question is whether the furniture was not at the time when that agreement was executed really her property. If it was her property, the supposed hiring was a mere fiction. On the other hand, if there was a real sale to Love before the hiring, when the chair was delivered, there is no difficulty in upholding the transaction. The county court judge finds, in effect, that the sale and hiring was a sham and a mere pretence, and that the real transaction was that Love advanced money by way of loan, and was to be secured by this agreement. That being so, the hiring agreement was a mere pretence. By the agreement it was provided that Love should be at liberty to take possession of the furniture in the event of the bankrupt's doing or failing to do certain things. If the property continued hers, it is clear that this is a licence by the owner to take possession of the furniture in these events. What the county court judge has decided is, that there was never any intention to give to Love any right of property independently of the terms of the hiring agreement. If that is so, this agreement is a licence to take possession of personal chattels as security for a debt within the 4th section of the Bills of Sale Act, 1878. These considerations seem to me to settle the matter. The county court judge thought that he was precluded by the decisions from giving effect to what he found to be the real transaction. I will not go through the authorities, as the Master of the Rolls has done so. There is no case in my opinion which decides that the Court is bound by the form of the agreement. My brother Lindley clearly expressed the contrary in the case of *Yorkshire Railway Wagon Co.* v. *Maclure* (1), where he says that, when documents are mere shams or cloaks to hide the real nature of the transaction, the Court will not allow them to prevent it from going into the real transaction. Cave, J., seems to have thought that I expressed a contrary opinion in *Manchester, Sheffield, and*

(1) 21 Ch. D. 309.

*Lincolnshire Ry. Co.* v. *North Central Wagon Co.* (1) I do not think that I did so. In that case, after examining the facts, I came to the conclusion that in fact there was a real transaction of sale. Here, according to the finding of the county court judge, which, so far as I can see, was quite correct, Love never was in any way owner of the goods apart from the supposed hiring agreement. If he had any title to them, it depended entirely on that agreement. If that agreement gave him any title to the goods, it would be an assurance, and therefore a bill of sale. But I look on it not in that light, but that, the supposed hirer and not Love being the real owner of the goods, the agreement was really a licence by the owner to take possession of the goods in default of payment of the loan. For these reasons, I think the appeal should be allowed.

LINDLEY, L.J. I am of the same opinion. I do not quite understand why the county court judge felt himself bound to come to a decision in point of law at variance with his view as to the facts. The facts as found by him seem to me to dispose of the case. The county court judge goes through the evidence, and he finds as follows: that the bankrupt did not intend by the passing of the chair and the words she used to sell the property to Love; that the transaction was in fact one of loan with a security; and that there never was a sale of the furniture to Love. If those are the facts, where is the decision or principle which prevented the judge from giving effect to them? I think the decisions on the subject are all consistent in principle. Any supposed inconsistency really depends on differences of facts. If the conclusion is arrived at that the hiring agreement was a real letting out of goods by the real owner of them, then it is not a bill of sale; but if, as in this case, the supposed hirer is the real owner of the goods, then it has at least the effect of a licence to seize the goods of the borrower of the money as a security for the loan. If the effect of the document is that the lender of the money, and supposed lessor of the goods, can make a title to them by means of the document by estoppel or otherwise, then the document will amount to an assurance within the

(1) 35 Ch. D. 191.

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Bills of Sale Act. The document either amounts to a licence to seize the goods, or, if the lender can make a title to them by the document, then it is an assurance of the goods, so that either way it is a bill of sale within the Act. It seems to me that the true principle is that in these cases the Court must look at the real transaction. In *Yorkshire Railway Wagon Co.* v. *Maclure* (1), and *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *North Central Wagon Co.* (2), and *United 40l. Loan Society* v. *Bexton* (3), the Court came to the conclusion that at the time of the alleged hiring the lessor of the goods was the real owner of them by reason of a previous transaction. If so, the case was not within the Bills of Sale Act. If, on the other hand, the conclusion of fact is arrived at that the supposed lessor is not the real owner of the goods, the result is that the supposed hiring agreement is within the Bills of Sale Act.

FRY, L.J. I come to the same conclusion as my brother Lindley. As soon as the facts of the case have been ascertained, the result is plain, viz., that the document is either an assurance of, or a licence to seize, personal chattels as a security for a loan, and so is within the Bills of Sale Act. The only other observations which I wish to make are as to the case by which the county court judge thought he was concluded, viz., *United 40l. Loan Society* v. *Bexton*. (3) In that case, which was an interpleader case, the execution debtor was the original owner of the goods. He had entered into a transaction with the claimant, which, according to the conclusion arrived at by Mathew, J., and myself, was a sale of the goods. The execution creditors were resisting the title asserted by the claimant. The first point which was put forward by them was that the transaction was void as a fraud on creditors within the statute of Elizabeth. That we disposed of by saying that there was no evidence of any fraud. The second point put forward was that the true transaction between the execution debtor and the claimant was such that there was no intention that the property in the goods should pass to the claimant. In order to deal with that point, it was

(1) 21 Ch. D. 309. (2) 35 Ch. D. 191; 13 App. Cas. 554.
(3) Not reported.

necessary to consider what the real intention of the parties was. I expressed an opinion with regard to that question that, whatever the ultimate intention of the parties might be, whether they intended that there should be a sale or that there should be a mortgage, the intention was that the property should pass. The question raised on that point was merely as to whether the intention of the parties was that the property should pass. Then the third point put forward was that the Bills of Sale Act applied to the transaction. As to that, we came to the conclusion that there was a real sale prior to the hiring transaction, and therefore that there was a real hiring. The result was that that point fell to the ground. I think the learned county court judge read the observations contained in the portion of my judgment which referred to the second point without sufficiently considering to what they referred.

LOPES, L.J. I think that the findings of fact by the county court judge conclude this case, and that they were right. If I had to describe this transaction, I should say that it was a licence to take possession of personal chattels as a security for a loan; and, if so, it was within the Bills of Sale Act. I have only one other observation to make. Cave, J., has criticised the decisions on this subject; but I cannot help thinking that he has misapprehended the effect of those decisions. I do not think that they are really inconsistent with each other or with what we are now deciding.

*Appeal allowed.*

Solicitors for the appellant, the official receiver: *The Solicitor to the Board of Trade.*

Solicitor for respondent: *J. R. Hall, for J. C. White.*

E. L.

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*Feb.* 1;
*April* 23, 30

[IN THE COURT OF APPEAL.]

PROUDFOOT *v.* HART.

*Landlord and Tenant—Lease—Covenant—"Good Tenantable Repair," What is.*

Under an agreement to keep a house in "good tenantable repair," and so leave the same at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it.

MOTION to set aside or vary the findings and award, and the judgment directed to be entered thereon, of an official referee, in an action to recover damages for the defendant's breach of agreement to repair a dwelling-house and premises situate in Caversham Road, Kentish Town.

The house and premises in question were let by the plaintiff to the defendant under an agreement in writing dated November 11, 1885, for a term of three years from November 12, 1885, and the defendant thereby agreed that he would "during the said term keep the said premises in good tenantable repair, and so leave the same at the expiration thereof."

On November 11, 1889, an order was made "that all questions in the action be tried by Mr. Ridley, one of the official referees, who shall have all the powers of certifying and amending of a judge of the High Court, and shall direct judgment to be entered and otherwise deal with the whole action, pursuant to Order XXXVI., r. 50."

The case was tried on November 14. On December 16, the official referee made his report, finding the issues raised by the pleadings in favour of the plaintiff, and directing judgment to be entered for him for 52*l.* 8*s.* 3*d.*

On December 19, judgment was entered accordingly, and on December 20, the defendant delivered this notice of motion. Before making his report the official referee stated his view as to what was the obligation of a tenant under an agreement to do "tenantable repairs," upon which view he proposed to assess the damages. From that statement, and from the report, it appeared

that he had awarded damages in respect of the cost incurred by the plaintiff after the termination of the tenancy in repapering the walls of rooms, where the paper which was upon them when the tenancy commenced had become worn out; in repainting the internal woodwork, where the paint which was on such woodwork when the tenancy commenced had worn off; in whitewashing and cleaning the staircases and ceilings; and in replacing with a new floor a kitchen floor which had existed when the tenancy commenced

The official referee awarded 47*l.* 8*s.* 3*d.* in respect of the above items, and 5*l.* in respect of the damage caused to the plaintiff by being unable to let his house whilst the repairs were being executed.

*T. W. Chitty*, for the plaintiff, took the preliminary objection that the defendant ought to have delivered his notice of motion to set aside the findings and award of the official referee before judgment had been entered. He referred to *Dyke* v. *Cannell* (1), *Bedborough* v. *Army and Navy Hotel Co.* (2), and *Serle* v. *Fardell.* (3)

THE COURT overruled the objection, being of opinion that Order XL., r. 6, gave the defendant power to move in the Queen's Bench Division after the judgment directed by the official referee to be entered had been entered.

*Morton Daniel*, for the defendant, in support of the motion. It is submitted that the learned official referee has wrongly construed the words "good tenantable repair" in the agreement. He has clearly awarded damages in respect of repairs which are decorative only, namely, repapering, repainting and whitewashing, and he has also put upon the tenant the cost, or part of the cost, of the new kitchen floor to replace the old one which had worn out. In *Crawford* v. *Newton* (4), tried before Cave, J., at Leeds, that learned judge explained what constituted "tenantable repair," and his decision was affirmed by the Court of Appeal. His definition does not include the kind of repairs for

(1) 11 Q. B. D. 180.
(2) 53 L. J. (Ch.) 658.
(3) W. N Feb. 8, 1890.
(4) 36 W. R. 54.

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which the official referee has allowed the plaintiff to recover in this case.

*T. W. Chitty*, for the plaintiff. The view taken by the official referee is the common view of this matter, and it is correct. No doubt in some cases painting and papering are decorative, but in others they are necessary to preserve the structure, and then the neglect to paint or paper is commissive waste. There are plaster walls which are only held together by the paper upon them, and there are ceilings which would fall were they not held up by the paper. So also painting is necessary in some cases to preserve the woodwork from decay. The official referee must be taken to have given his decision in this case upon that view, and to have found as facts that the painting and papering were necessary for preserving the structure. The agreement provides that the tenant shall "keep" the premises in good tenantable repair. In order to fulfil that obligation he must put them into good repair: *Payne* v. *Haine.* (1) Upon that principle the defendant was bound to put down the new kitchen floor. There is nothing to shew that the official referee has not followed the decision in *Crawford* v. *Newton.* (2)

CAVE, J. My brother Mathew has asked me to state my opinion first; and I do not know how to state it in language other than that which I have had occasion to use upon more than one occasion before this. "Tenantable repair," to my mind, extends to commissive waste, undoubtedly. I also think that it extends to permissive waste, and that the tenant must not only make good the damage going beyond mere ordinary wear, which is done by himself and by his family and servants, but that he must also make good the damage which is done by other causes—such, for instance, as a casual storm that takes off a slate from the roof, or a stone thrown from outside which breaks a window. All these things seem to me to fall within his obligation to keep the premises in "tenantable repair"; and, if he neglects to do those things, and the result is that still further damage is caused to the structure, then he must make good that further damage also, because it comes of his not performing his covenant

(1) 16 M. & W. 541. (2) 36 W. R. 54.

to do "tenantable repairs." With regard to paper, as I have said before, I cannot see how in any case a man can be bound to put new paper on the walls simply because the old paper which was on at the time when he took the house, or which he has subsequently put on the walls, has become worn out. Mr. Chitty has suggested the possibility of paper being required to hold a wall or a ceiling together. When a case of that kind occurs it will have to be dealt with, though I can hardly conceive the case of a wall needing a paper to hold it together. With regard to the ceiling, if it were the case that the ceiling is only held together by the paper, and the tenant were to choose to tear the paper off and let the ceiling fall down, that would undoubtedly be commissive waste. It may possibly be (I do not wish to give a decided opinion upon it), that under those circumstances he would be bound to put up new paper when the old one shewed signs of no longer being able to perform its duty of keeping the ceiling up. That may be the case. It does not appear that anything of the kind occurred here; and it is not necessary, therefore, to give an opinion upon it.

With regard to the paint, again, I can only repeat that painting is decoration, and that it is not necessary for the tenant to paint the woodwork inside where it is only required for the purpose of decoration. Where the woodwork, as he receives it, is painted, and the paint wears away in the course of his tenancy, and he does not repaint, so that the woodwork underneath perishes from want of the preserving effects of paint, then, I think again, he would be liable on the ground of permissive waste; but, so long as no damage is done to the woodwork, the mere fact that from lapse of time the paint has worn off does not in such a tenancy as this call upon him to replace it by fresh paint.

So, again, with regard to the whitewashing of the ceilings, we all know that in the ordinary course ceilings get black and have to be whitewashed; and, if at the end of such a tenancy as this the ceilings have become in the natural course of things black, the tenant is not bound to whitewash them. That, again, is a repair which the landlord must do.

So with regard to the walls, the floor, the doors, the windows, and all the different parts of the house, the tenant is bound

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Cave, J.

where there is a breakage—whether arising from his own family or from some external accident—to repair it to the best of his ability; but he is never bound, when a portion of the structure has become absolutely worn out and necessary to be replaced, to substitute a new structure in the place of it. All that he undertakes to do is to patch the thing up so long as it is, in the nature of things, right and reasonable that the thing should be patched up. But, where it has got to such a state that patching up is of no avail—and we all know that things do at last get to that state—then the tenant is not bound to put in anything new, or to pay any proportion of the cost of putting in the new thing, because the old one has become unfit to discharge its duty. He may be in a difficulty, of course, if it happens in the course of his tenancy that the thing has become worn out, and his landlord has not undertaken to repair. The tenant may then be put in the difficulty of having either to replace it himself or go without it; but, if he does replace it, he does it for his own sake, and not because he is under any obligation as regards his landlord to do it. It is quite impossible to read through what the learned official referee has said without seeing that he has not adopted that view of the law, because he says, "I thought that if the paper or paint was thoroughly worn out he must repaint or repaper where done before." That is exactly the thing he is not bound to do. Where the paper or the paint is thoroughly worn out he is not bound to replace either paper or paint, unless his omission to do so has caused damage to the fabric which otherwise is protected by the paper, or by the paint. Then he goes on to say: "Cleaning and scouring might suffice in some cases, but not in all." The tenant is certainly not bound to clean or to scour when the state of the paper is such as might naturally be expected from ordinary wear during the course of the tenancy. Then with regard to the whitening of the ceilings, the official referee says that he did not believe the defendant fairly or properly whitened the ceilings or papered the top room. I have already said that under ordinary circumstances he was not bound to whiten the ceilings or paper the top room. He was not bound to do that unless it can be put by some exercise of ingenuity as being permissive waste of the fabric underneath not to do it.

Nothing of the kind appears to have been suggested here. The learned official referee seems to have thought that the tenant was bound, because the ceilings were dirty from ordinary wear, to whitewash them, and bound also to paper the top room, because the paper which was then on it had gone through its ordinary existence, and was in such a state that it required to be replaced. That is, as I have said, not the duty of the tenant under such a lease as this.

With regard to the floor, that is a question upon which more difficulty arises, as one does not know precisely what the condition of the floor was at the time; but the fact that the landlord had substituted a floor of a different kind from the old floor was very strong evidence to shew that the old floor had come to the end of its existence as a floor; and, unless it can be shewn that ordinary repairing—patching, that is to say—of the old floor would have made it a good and sufficient floor at the termination of the lease, there is no ground for calling upon the tenant to pay any proportion whatever of the expense of substituting a new or different kind of floor. With regard to the 5*l.* to which reference was made, that of course depends entirely upon the other part of the case. If the tenant was bound to do the repairs to the extent of 47*l.*, he might be very properly ordered to pay 5*l.* as the loss which was sustained by the landlord through having his house empty while it was being repaired; but, if it should turn out that, taking the view which I have just been expressing with regard to the law of the case, the amount of repairs which the defendant omitted to do amounted to nothing or to something trivial, then the sum of 5*l.* would either disappear altogether or become very much diminished.

I think we must send this case back to the official referee in order that he may try it again with the light which is now thrown upon it.

MATHEW, J. I am of the same opinion. I agree with the judgment of my learned brother, and with the reasons which he has given. It may not be easy to give a compendious description of the obligations of a man who has bound himself to keep premises in "tenantable repair," because it is not easy to say

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compendiously what would be reasonable conduct under a great variety of circumstances, but it is very easy to see and to say what such a tenant is not bound to do. He is not bound to repair what is worn out by age, nor to restore it, nor is he bound to replace anything that is worn out by age. If those simple rules were kept before the minds of the official referees in dealing with each particular case, they would very clearly see whether the repair asked for is analogous to rebuilding or restoration. If the repair which the landlord requires to be done is one of that character, as a general rule the tenant would not be bound to do it.

*Case sent back to the Official Referee.*

The plaintiff appealed.

April 23, 30. *Winch, Q.C.*, and *T. W. Chitty* (*Ernest Pollock*, with them), for the plaintiff. The obligation of a tenant under a contract to keep and deliver up premises in "good tenantable repair" is to put and keep them in such repair as to render them fit for a tenant to go in and occupy. The tenant is bound to put them in good repair if they are out of repair when his tenancy begins: *Payne* v. *Haine*. (1) In arriving at what is "good tenantable repair" regard must be had to the condition of the premises and the state of things existing when the tenancy began. It is submitted that the learned judges in the Court below were wrong in holding that the tenant was not bound to replace things worn out by age. If that view be correct the words "fair wear and tear excepted," which are commonly inserted in leases similar to this, are useless. The question is one of degree in each case. The premises must be looked at, and it must be seen what is necessary to put them into a condition of safety and reasonable comfort for a tenant: *Belcher* v. *Mackintosh*. (2) If the Court below were right in saying that where the paper and paint had become worn off the tenant was not liable to repaper and repaint, the landlord would be in the same position as if no agreement to keep the premises in tenantable repair existed, because it is clear that at common law a tenant is liable for permissive waste.

(1) 16 M. & W. 541. (2) 8 C. & P. 720; 2 Moo. & R. 186.

*Davies* v. *Davies* (1) is an authority for that proposition. The true view is that the tenant is bound to repaper and repaint with paper and paint such as are reasonably proper for the kind of house in question, and he is bound to do that because a tenant taking the house could not otherwise live in it with reasonable comfort. As to the kitchen floor, upon the same principle the tenant was bound to renew it if it could not be patched up. The judgment of the Court below implies that, if patching it up would not avail, the tenant might do nothing.

[They also referred to *Crawford* v. *Newton*. (2)]

*Morton Daniel*, for the defendant. The judgment of the Court below was right. It proceeded upon the decisions in *Crawford* v. *Newton* (2) and *Belcher* v. *Mackintosh* (3), and it is clear that the official referee in the present case thought that the defendant, under his agreement to keep and have the premises in "good tenantable repair," was bound to do papering and painting which was merely decorative repair.

*T. W. Chitty*, in reply.

LORD ESHER, M.R. The question in this case arises between landlord and tenant as to whether the tenant did, or did not, break his agreement, made with respect to a tenancy for three years, to keep premises in "in good tenantable repair," and leave them in good tenantable repair at the expiration of the tenancy.

The case was tried before one of the official referees, Mr. Ridley, and he gave a judgment laying down the principles upon which he meant to act, and did act, in making his award. The case came before a Divisional Court, who thought that some—not all—of those principles were not correct, and that if he did act upon them it might be that he had arrived at a wrong result in his decision as to figures and facts. The Divisional Court, therefore, did not attempt absolutely to decide the case, but they sent it back to the official referee in order that he might again take it into consideration, and work out his figures upon the principles enunciated by them. The plaintiff has appealed to

(1) 38 Ch. D. 499. (2) 36 W. R. 54.
(3) 8 C. & P. 720; 2 Moo. & R. 186.

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this Court, and his appeal must be based upon the ground that the principles stated by Mr. Ridley are right, and those stated by the Divisional Court are wrong. The question, therefore, arises whether we agree with Mr. Ridley's principles or with those of the Divisional Court, but we have open to us the alternative course of saying that we do not agree with either, and of ourselves laying down the principles upon which we think that the official referee ought to deal with the facts and work out the figures.

What is the true construction of a tenant's contract to keep and deliver up premises in "tenantable repair"? Now, it is not an express term of that contract that the premises should be *put* into tenantable repair, and it may therefore be argued that, where it is conceded, as it is in this case, that the premises were out of tenantable repair when the tenancy began, the tenant is not bound to put them into tenantable repair, but is only bound to keep them in the same repair as they were in when he became the tenant of them. But it has been decided—and, I think, rightly decided—that, where the premises are not in repair when the tenant takes them, he must put them into repair in order to discharge his obligation under a contract to keep and deliver them up in repair. If the premises are out of repair at any time during the tenancy the landlord is entitled to say to the tenant, "you have now broken your contract to keep them in repair;" and if they were out of repair at the end of the tenancy he is entitled to say, "you have broken your contract to deliver them up in repair." I am of opinion that under a contract to keep the premises in tenantable repair and leave them in tenantable repair, the obligation of the tenant, if the premises are not in tenantable repair when the tenancy begins, is to put them into, keep them in, and deliver them up in tenantable repair. Now, what is "tenantable repair"? Definitions have been given at different times by the Courts. In *Belcher* v. *Mackintosh* (1), Alderson, B., directed a jury as to the law with respect to a covenant by a lessee to put premises into "habitable repair," and so to deliver up the same. He says (I am reading from Moody and Robinson's Report): "It

(1) 8 C. & P. 720; 2 Moo. & R. 186.

is difficult to suggest any material difference between the term 'habitable repair' used in this agreement, and the more common expression 'tenantable repair'; they must both import such a state as to repair that the premises might be used and dwelt in not only with safety, but with reasonable comfort, by the class of persons by whom, and for the sort of purposes for which, they were to be occupied." That is the whole definition, and, so far as it goes, it is a good one. Then he proceeds to apply it: "They were old premises, and dilapidated; the agreement was not that the tenant should give the landlord new buildings at the end of his tenancy, but that he should take the premises out of their former dilapidated condition, and deliver them up fit to be occupied for the purposes they were used for." In *Payne* v. *Haine* (1) the contract was to keep the premises, and at the expiration of the tenancy deliver up the same, in "good repair," which is much the same thing as "tenantable repair." This was the case which decided that in order to satisfy the tenant's obligation under his contract it was not sufficient for him to deliver up the premises in the same condition of repair as when he took them; he must deliver them up in good repair, even if they were not in good repair when the tenancy began. Parke, B., in the course of his judgment, said: "This is a contract to keep the premises in good repair *as old premises*, but that cannot justify the keeping them in bad repair because they happened to be in that state when the defendant took them. The cases all shew that the age and class of the premises let, with their general condition as to repair, may be estimated in order to measure the extent of the repairs to be done. Thus a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square; but this lessee cannot say he will do no repairs, or leave the premises in bad repair, because they were old and out of repair when he took them. He was to keep them in good repair, and in that state, with reference to their age and class, he was to deliver them up at the end of the term." Alderson, B., said: "A contract to 'put' premises in good repair cannot mean to furnish new ones where those demised were old, but to put and keep them in good tenantable

(1) 16 M. & W. 541.

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repair with reference to the purpose for which they are to be used." Rolfe, B., said: "The term 'good repair' is to be construed with reference to the subject-matter, and must differ, as that may be a palace or a cottage; but to 'keep in good repair' presupposes the putting it into, and means that during the whole term the premises shall be in good repair." In *Muntz* v. *Goring* (1) Tindal, C.J., said: "Every one knows what such a covenant means, and the tenant must fulfil it according to the nature of the premises; for it is established by *Stanley* v. *Towgood* (2) and other cases that the same nicety of repair is not exacted for an old building as for a new one." It seems to me that in none of these cases can there be found quite as full a definition of the meaning of the term "tenantable repair" as those words require and import. The result of the cases seems to be this: the question whether the house was, or was not, in tenantable repair when the tenancy began is immaterial; but the age of the house is very material with respect to the obligation both to keep and to leave it in tenantable repair. It is obvious that the obligation is very different when the house is fifty years older than it was when the tenancy began. Lopes, L.J., has drawn up a definition of the term "tenantable repair" with which I entirely agree. It is this: "'Good tenantable repair' is such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it." The age of the house must be taken into account, because nobody could reasonably expect that a house 200 years old should be in the same condition of repair as a house lately built; the character of the house must be taken into account, because the same class of repairs as would be necessary to a palace would be wholly unnecessary to a cottage; and the locality of the house must be taken into account, because the state of repair necessary for a house in Grosvenor Square would be wholly different from the state of repair necessary for a house in Spitalfields. The house need not be put into the same condition as when the tenant took it; it need not be put into perfect repair; it need only be put into such a state of repair as renders

(1) 4 Bing. N. C. 451. (2) 3 Bing. N. C. 4.

it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it. I think our definition is an expansion of the definitions given in the earlier cases, or rather it is a collocation of all the different parts of the definition to be collected from those cases. I can see nothing in the case of *Crawford* v. *Newton* (1) contrary to our definition. I think that case goes far to support it.

I will add a few words as to the way in which the definition should be worked out in the present case. The official referee appears to have said that in his view "tenantable repair" included painting, papering, and decorating. If he meant, as I think he must have meant, that it included *all* papering, painting, and decorating, I have no hesitation in saying that his construction of the term "tenantable repair" was wrong. Again, he has said that the tenant's obligation is to "repaper with similar paper to that which was on the walls before, and repaint with similar paint to that which was on the painted portion of the premises before." I think that view was wrong also. With regard to the papering, Cave, J., in the Court below, said: "I cannot see how in any case a man can be bound to put new paper on the walls simply because the old paper which was on at the time when he took the house, or which he has subsequently put on the walls, has become worn out." I agree that he is not bound to repaper simply because the old paper has become worn out, but I do not agree with the view that under a covenant to keep a house in tenantable repair the tenant can never be required to put up new paper. Take a house in Grosvenor Square. If when the tenancy ends, the paper on the walls is merely in a worse condition than when the tenant went in, I think the mere fact of its being in a worse condition does not impose upon the tenant any obligation to repaper under the covenant, if it is in such a condition that a reasonably-minded tenant of the class who take houses in Grosvenor Square would not think the house unfit for his occupation. But suppose that the damp has caused the paper to peel off the walls, and it is lying upon the floor, so that such a tenant would think it a disgrace, I should say then that the tenant was bound, under his

(1) 36 W. R. 54.

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covenant to leave the premises in tenantable repair, to put up new paper. He need not put up paper of a similar kind—which I take to mean of equal value—to the paper which was on the walls when his tenancy began. He need not put up a paper of a richer character than would satisfy a reasonable man within the definition.

The same view applies as to painting. If the paint is in such a state that the woodwork will decay unless it is repainted, it is obvious that the tenant must repaint. But I think that his obligation goes further than that. A house in Spitalfields is never painted in the same way as one in Grosvenor Square. If the tenant leaves a house in Grosvenor Square with painting only good enough for a house in Spitalfields, he has not discharged his obligation. He must paint it in such a way as would satisfy a reasonable tenant taking a house in Grosvenor Square. As to whitewashing, one knows it is impossible to keep ceilings in the same condition as when they have just been whitewashed. But if, though the ceilings have become blacker, they are still in such a condition that a reasonable man would not say, "I will not take this house because of the state of the ceilings," then I think that the tenant is not bound, under his covenant to leave the house in tenantable repair, to whitewash them. Take, again, the case of a house in Grosvenor Square having an ornamental ceiling, which is a beautiful work of art. A tenant goes in and finds such a ceiling in the house, and in course of time the gilding becomes in such a bad condition, or so much worn off, that the ceiling is no longer ornamental. I should think that a reasonable tenant taking a house in Grosvenor Square would not require a gilded ceiling at all. If that be so, on the mere covenant to leave the premises in tenantable repair, I should think that the tenant who has entered into that covenant was not bound to regild the ceiling at all. As to the floor, it may have been rotten when the tenancy began. If it was in such a state when the tenancy began that no reasonable man would take the house with a floor in that state, then the tenant's obligation is to put the floor into tenantable repair. The question is, what is the state of the floor when the tenant is called upon to fulfil his covenant? If it has become perfectly rotten he

must put down a new floor, but if he can make it good in the sense in which I have spoken of all the other things—the paper, the paint, the whitewashing—he is not bound to put down a new floor. He may satisfy his obligation under the covenant by repairing it. If he leaves the floor out of repair when the tenancy ends, and the landlord comes in, the landlord may do the repairs himself and charge the costs as damages against the tenant; but he is only entitled to charge him with the necessary cost of a floor which would satisfy a reasonable man taking the premises. If the landlord puts down a new floor of a different kind, he cannot charge the tenant with the cost of it. He is entitled to charge the cost of doing what the tenant had to do under his covenant; but he is not entitled to charge according to what he has himself in fact done.

I think we have explained more fully than it was explained in the Court below what is the true construction of the contract to keep premises in tenantable repair. If our judgment is inconsistent with any part of the judgment of Cave, J., we must of course be taken to disagree with it, but we certainly agree that this case must go back to the official referee.

LOPES, L.J. I am of the same opinion, and as the case is an important one I desire to add a few words. The tenant's contract in the present case was, that he would "during the said term keep the said premises in good tenantable repair, and so leave the same at the expiration thereof."

What is the meaning of "good tenantable repair"? That expression appears to me to mean such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it. I do not say that there is anything new in this definition; but it appears to me a good definition as the result of the authorities which have been referred to by the Master of the Rolls. What is the obligation of the tenant under such a contract? First, he must, if the premises are out of repair when he takes them, put them into good tenantable repair. *Payne* v. *Haine* (1) is an authority for saying

(1) 16 M. & W. 541.

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that that is his obligation. It is clear also that under such a contract as this he must commit no waste. Therefore, with respect to the kitchen floor, the tenant's obligation in the present case was either to repair the old floor, or to put down a new one. As to papering and painting, generally speaking the tenant would not be bound to repaper or repaint. Most clearly he is not bound to repaper with similar paper to that which was on the walls when the tenancy began, or to repaint with similar paint. Most clearly, also, he is not bound to do repairs which are merely decorative. But if at the end of the lease the paper and paint are in such a condition as to cause portions of the premises to go into decay, he is bound to repaper and repaint to such an extent as will satisfy the terms of the definition which I have stated. Again, if the paint through the lapse of time has worn off, or the paper has become worn out, so that their condition has become such as not to satisfy a reasonably-minded tenant of the class who would be likely to take the house, then he must repaper and repaint so as to make the premises reasonably fit, within the definition, for the occupation of such a tenant; and what I have said with respect to papering and painting applies also to all the other kinds of repair which have been mentioned.

I do not think we can say that the judgment of the Court below was wrong; it was certainly right so far as the learned judges came to the conclusion that the case should be sent back to the official referee. I am of opinion that it should go back with the opinion of this Court to guide him in determining the questions raised. This appeal must be dismissed.

*Appeal dismissed.*

Solicitors for plaintiff: *Proudfoot & Chaplin.*
Solicitor for defendant: *T. R. Epps.*

W. A.

[IN THE COURT OF APPEAL.]

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*April* 28.

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*Gift—Chattel capable of Delivery—Passing of Property to Donee.*

A gift of a chattel capable of delivery, made per verba de presenti by a donor to a donee, and assented to by the donee, whose assent is communicated to the donor, does not pass the property in the chattel without delivery.

APPEAL from the judgment of Lopes, L.J., sitting in the Queen's Bench Division.

The action was an interpleader issue to try the right to one-fourth of the proceeds of the sale of a horse called Kilworth. The horse was the property of one Benzon, who by words of present gift gave to the defendant one undivided fourth part. Benzon informed the person in whose stable the horse was of the gift, but did not tell the defendant that he had done so, nor did the defendant know of the communication. Subsequently the horse was included in a bill of sale given by Benzon to the plaintiff, to whom he was indebted. The horse was sold under the bill of sale at Tattersall's, and the defendant claimed one-fourth of the proceeds. Tattersall interpleaded, and this issue was directed to be tried.

The Lord Justice gave judgment for the defendant.

The plaintiff appealed.

1890. Jan. 20. *Addison, Q.C.*, and *Henn Collins, Q.C.* (*H. Kisch*, with them), for the plaintiff. The transaction did not amount to an actual gift as distinguished from a promise to give. The property in chattels cannot be transferred by a mere parol gift without delivery or something equivalent to delivery. There must be delivery of possession, or constructive possession, or something which puts it out of the power of the donor to revoke the gift. There was nothing amounting to constructive delivery in this case. The person in whose custody the horse was never did anything by way of acknowledging the defendant's title. He continued to hold the horse as Benzon's agent as before, and there was nothing to prevent Benzon from giving notice to his agent revoking the gift.

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[They cited on this point: *Irons* v. *Smallpiece* (1); *Shower* v. *Pilck* (2); *Bourne* v. *Fosbrooke* (3); *London and Brighton Ry. Co.* v. *Fairclough* (4); Comyn's Digest, tit. Biens, D. 2; Shepherd's Touchstone, "Of a Gift"; *Smith* v. *Smith* (5); Blackstone's Commentaries, 21st ed., vol. 2, p. 440; *Bunn* v. *Markham* (6); *Wortes* v. *Clifton* (7); *Hudson* v. *Hudson* (8); *Hooper* v. *Goodwin* (9); *Walter* v. *Hodge* (10); *Winter* v. *Winter* (11); *Ward* v. *Turner* (12); *Wilbraham* v. *Snow* (13); Jenkins' Reports, 3rd Century, Case 9; *Lampleigh* v. *Brathwait* (14); *Ward* v. *Audland* (15); *Lunn* v. *Thornton* (16); *Tate* v. *Hilbert* (17); *Reeves* v. *Capper*. (18)]

If the gift was revocable, then the plaintiff is entitled to succeed, for a subsequent assignment for value would operate as a revocation, and even if the plaintiff's bill of sale were obtained by fraud it is only voidable at the option of the grantor, and on the terms that it shall stand security for the actual amount advanced: *Urquhart* v. *Macpherson* (19); *Aylesford* v. *Morris*. (20)

*Pollard*, and *Hugh Mitchell*, for the defendant. At common law a gift by word of mouth of a chattel, accepted by the donee, vests the property in the donee without delivery. In Perkins' Profitable Book, pl. 57 (p. 13 of edit. of 1827), gifts of growing corn or of a young tree, neither of which is capable of delivery, are said to be good by word of mouth. The intention of the donor to give becomes irrevocable on the assent of the donee to the gift: *London and Brighton Ry. Co.* v. *Fairclough* (4), where the contrast is drawn between donatio inter vivos and donatio mortis causâ: see also note to *Lunn* v. *Thornton* (21), and per Parke, B., in *Flory* v. *Denny*. (22) Cases in which there was no allegation of acceptance and cases of contract cannot govern such a case as

(1) 2 B. & A. 551.
(2) 4 Ex. 478.
(3) 18 C. B. (N.S.) 515.
(4) 2 M. & G. 674, note at p. 691.
(5) 2 Str. 955.
(6) 2 Marsh, 532.
(7) Roll. Rep. 61.
(8) Latch, 214, 263.
(9) 1 Swans. 485, at p. 491.
(10) 2 Swans. 92, at p. 101.
(11) 4 L. T. (N.S.) 639; 9 W. R. 747.
(12) 2 Ves. Sen. 431.
(13) 2 Wms. Saund. 47 a.
(14) 1 Sm. L. C. 9th ed. 166, n.
(15) 16 M. & W. 862, at p. 870.
(16) 1 C. B. 379.
(17) 2 Ves. Jun. 111.
(18) 5 Bing. (N.C.) 136, at p. 139.
(19) 3 App. Cas. 831.
(20) Law Rep. 8 Ch. 484.
(21) 1 C. B. 379, at p. 381.
(22) 7 Ex. 581, at p. 583.

the present, in which there was assent on the part of the donee to the gift. In *Irons* v. *Smallpiece* (1), there was no evidence or even allegation of acceptance, and the transaction is spoken of in the argument as "contract."

[They cited *Re Harcourt* (2), and *Ex parte Ridgway* (3), and argued on the facts that there was an equivalent to delivery, and that the bill of sale was void on the ground that the consideration was untruly stated.]

*Henn Collins, Q.C.*, in reply.

*Cur. adv. vult.*

1890. April 28. FRY, L.J. The judgment I am about to read is that of Lord Justice Bowen and myself.

The question in this interpleader issue arises in respect of a sum of money representing one-fourth of the proceeds of a horse called Kilworth, sold by Messrs. Tattersall. The plaintiff claims the money under a bill of sale executed by one Benzon, comprising this and other horses. The defendant claims it under an earlier gift of one-fourth of the horse to him by Benzon.

The relevant facts, as they appear in the judgment of Lopes, L.J., and in that part of the evidence to which he attached credence, are shortly as follows:—

The horse was in June, 1888, the property of Benzon, and was kept at the stables of a trainer named Yates, in or near Paris, and on the 8th of that month was ridden in a steeplechase by Moore, a gentleman rider. In consequence, as it appears, of some accident, the horse was not declared the winner, and on the same day, according to the view of the evidence taken by the learned judge, Benzon by words of present gift gave to Moore, and Moore accepted from Benzon, one undivided fourth part of this horse.

A few days subsequently Benzon wrote to Yates, in whose stables the horse was, and told him of the gift to Moore. But he did not inform Moore, nor did Moore know of any communication to Yates of the fact of the gift.

On July 9, 1888, Cochrane advanced 3000*l.* by way of loan to

(1) 2 B. & A. 537. (2) 31 W. R. 587.
(3) 15 Q. B. D. 447.

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Benzon, and took from him a promissory note for 3500*l.*, payable on August 9 following.

On July 16 of the same year, Cochrane advanced to Benzon a further sum of 4000*l.*, and took a promissory note for 4800*l.*, payable on September 16.

On July 26 Cochrane advanced to Benzon two sums of money:—One, 1680*l.* 10*s* 11*d.* (to be paid to one Sherard, a trainer), and 745*l.*; making together 2425*l.* 10*s.* 11*d.* And on the same day Benzon executed a bill of sale for 10,000*l.*, under which Cochrane claims. Kilworth and other horses were included in the schedule to this instrument.

It is proved by the evidence of the witnesses, whom the learned judge believed, that, before the execution of the bill of sale, Benzon, with the assistance of a friend, Mr. Powell, was going through the list of horses to be included in the schedule, and that when Kilworth was mentioned Powell spoke of Moore's interest in the horse, and that thereupon a discussion arose as to what was to be done with it, and that Cochrane undertook that it should be "all right." After this the bill of sale was executed by Benzon.

On these facts, it was argued that there was no delivery and receipt of the one-fourth of the horse, and, consequently, that no property in it passed by the gift. The learned judge has, however, held that delivery is not indispensable to the validity of the gift.

The proposition on which the Lord Justice proceeded may perhaps be stated thus: that where a gift of a chattel capable of delivery is made per verba de præsenti by a donor to a donee, and is assented to by the donee, and that assent is communicated to the donor by the donee, there is a perfect gift, which passes the property without delivery of the chattel itself. This proposition is one of much importance, and has recently been the subject of some diversity of opinion. We therefore feel it incumbent upon us to examine it, even though it might be possible in the present case to avoid that examination.

The proposition adopted by the Lord Justice is in direct contradiction to the decision of the Court of King's Bench in the year 1819 in *Irons* v. *Smallpiece.* (1) That case did not proceed

(1) 2 B. & A. 551.

upon the character of the words used, or upon the difference between verba de præsenti and verba de futuro, but upon the necessity of delivery to a gift otherwise sufficient. The case is a very strong one, because a Court consisting of Lord Tenterden, C.J., and Best and Holroyd, J.J., refused a rule nisi, and all held delivery to be necessary. The Chief Justice said: "I am of opinion that, by the law of England, in order to transfer property by gift there must either be a deed or instrument of gift, or there must be an actual delivery of the thing to the donee," and he went on to refer to the case of *Bunn* v. *Markham* (1) as a strong authority.

These observations of the Chief Justice have created some difficulty. What did he mean by an instrument as contrasted with a deed? If he meant that an instrument in writing not under seal was different from parol in respect of a gift inter vivos, he was probably in error; but if in speaking of the transfer of property by gift, he included gifts by will as well as gifts inter vivos, then by instrument he meant testamentary instrument, and his language was correct.

Holroyd, J., was equally clear on the principal point: "In order to change the property by a gift of this description" (by which we understand him to mean, a gift inter vivos) "there must be a change of possession."

The correctness of the proposition thus laid down has been asserted in many subsequent cases of high authority.

Thus in *Reeves* v. *Capper* (2) the Court of Common Pleas under Tindal, C.J., referred to *Irons* v. *Smallpiece* (3), and the proposition "that a verbal gift of chattels, unaccompanied with delivery of possession, passes no property to the donee" as being good law and without the expression of any doubt.

In 1849, in the case of *Shower* v. *Pilck* (4), the same question came before the Court of Exchequer, and the Court without hesitation affirmed the ruling of Lord Truro, then Wilde, C.J., at nisi prius, and adopted the rule of *Irons* v. *Smallpiece*. (3) The alleged gift in question was per verba de futuro, but in respect of chattels then in the possession of the intended donee. The gift was held open to both objections. "To pass the pro-

(1) 2 Marsh. 532.
(2) 5 Bing. N. C. 136.
(3) 2 B. & A. 551.
(4) 4 Ex. 478.

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perty," said Alderson, B., "there must be both a gift and a delivery: here there is hardly a gift." "There must be a delivery to make the gift valid," said Lord Cranworth, then Rolfe, B., "here there is a mere statement that the goods which the defendant has in her possession the owner will give her."

Again (in 1865), in *Bourne* v. *Fosbrooke* (1), Erle, C.J., adopted the rule in *Irons* v. *Smallpiece* (2) as undoubted law; and in 1870, in *Douglas* v. *Douglas* (3), the Court of Exchequer declined to consider whether they should overrule that case, and expressed a decided leaning in its favour.

In Ireland, in like manner, the doctrine has been asserted, Lord Plunkett, as Lord Chancellor, holding delivery to be the only admissible evidence of the gift of a personal chattel: *Patterson* v. *Williams.* (4)

We have thus a great body of authority in favour of the necessity of delivery; but, on the other hand, there are several authorities which require consideration.

The first note of dissent was sounded in the year 1841, or twenty-two years after the decision of the case of *Irons* v. *Smallpiece* (2) by Serjeant Manning in a note on the case of the *London and Brighton Ry. Co.* v. *Fairclough* (5), in which he impugned the accuracy of *Irons* v. *Smallpiece* (2), and asserted that after the acceptance of a gift by parol the estate is in the donee without any actual delivery of the chattel. The authorities cited in that note we shall hereafter consider.

In 1845, in *Lunn* v. *Thornton* (6), Maule, J., interlocutorily observed that he had always thought Lord Tenterden's opinion in *Irons* v. *Smallpiece* (2) very remarkable, because by referring to instruments of gift he left it to be inferred that an assignment might be otherwise than by deed. But beyond this his criticism did not proceed. To the report of this case Serjeant Manning appended a note similar to that in the second volume of Manning and Granger.

Two years afterwards (1847) Lord Wensleydale, in *Ward* v *Audland* (7), quoted the passage from Lord Tenterden's judgment

(1) 18 C. B (N S.) 515.
(2) 2 B. & A 551.
(3) 22 L. T. (N.S.) 127.
(4) L. & G. temp. Plunkett, 95.
(5) 2 Man. & G. 674, at p. 691.
(6) 1 C B. 379.
(7) 16 M. & W. 862.

already cited, and observed, "that is not correct." To which counsel replied by referring to the criticism of Maule, J., and the learned judge made no further observation. The criticism of the two learned judges was probably directed to the same point, namely, the use of the expression, deed or instrument. Lord Cranworth was present as a Baron of the Exchequer during the argument in *Ward* v. *Audland* (1), and, as we have seen, two years afterwards unhesitatingly adopted *Irons* v. *Smallpiece* (2), and that without note or comment—a course which he would hardly have pursued if he knew that Lord Wensleydale considered the case itself bad law.

In 1852, in the case of *Flory* v. *Denny* (3), where the authorities lastly cited were mentioned, Lord Wensleydale referred to the two notes of Serjeant Manning, and read a portion of the later, but expressed no opinion as to the correctness or incorrectness of the conclusion.

In 1861 the case of *Winter* v. *Winter* (4) came before the Court of Queen's Bench. In that case a barge belonging to a father had been in the actual possession of his son as his servant. The father gave the barge to the son, and he subsequently, with the father's knowledge and assent, possessed and worked the barge as his own, and paid the wages of the crew. Wightman, J., upheld the title of the son on the ground of a change in the possession consequent on the gift. Crompton, J., on the ground that actual delivery of the chattel is not necessary to a gift inter vivos, and that it was sufficient that the conduct of the parties shewed that the ownership had been changed. Lord Blackburn, then Blackburn, J., simply concurred. What, however, is most to our present point, Crompton, J., said, that although *Irons* v. *Smallpiece* (2) and *Shower* v. *Pilok* (5) had not been overruled, they had been hit hard by the subsequent cases.

In 1883 the case of *Danby* v. *Tucker* (6) came before Pollock, B., sitting as a judge of the Chancery Division, and he declined to follow the decision of *Irons* v. *Smallpiece* (2), saying that he "certainly could not accede to the proposition generally

(1) 16 M. & W. 862.
(2) 2 B. & A. 551.
(3) 7 Ex. 581.
(4) 4 L. T. (N.S.) 639.
(5) 4 Ex. 478.
(6) 31 W. R. 578.

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that the actual delivery of a chattel is necessary to create a good gift inter vivos." "The question to be determined," he said, "is not whether there has been an actual handing over of property manually, but whether, looking at all the surrounding circumstances of the case, and looking particularly at the nature and character of the chattel which is proposed to be given, there has or has not been a clear intention expressed on the part of the donor to give, and a clear intention on the part of the recipient to receive, and act upon such gift. Whenever such a case should arise again, I am confident that that would be the basis of the decision of a Court of Common Law, and, of course, the same result would follow in a Court of Equity."

Lastly (in 1885), Cave, J., in the case of *In re Ridgway* (1), expressed his opinion "that it is going too far to say that the retention of possession by the donor is conclusive proof that there is no immediate present gift; although, undoubtedly, unless explained or its effect destroyed by other circumstances, it is strong evidence against the existence of such an intention."

These two latter authorities have been followed by Lopes, L.J., in the case now before us, feeling that when sitting as a judge of the first instance he could not rightly depart from them.

There is thus some difference of judicial opinion as to the rule stated in *Irons* v. *Smallpiece.* (2) We cannot think that the few recent decisions to which we have referred are enough to overrule the authority of that decision, and the cases which have followed it, but they make it desirable to inquire whether the law as declared before 1819 was in accordance with that decision, or with the judgment of Pollock, B., in *Danby* v. *Tucker.* (3)

This inquiry into the old law on the point is one of some difficulty, for it leads into rarely-trodden paths, where (as is very natural) we have not had the assistance of counsel, and where the materials for knowledge are for the most part undigested.

The law enunciated by Bracton in his book "de acquirendo rerum dominio," seems clear to the effect that no gift was complete without tradition of the subject of the gift. "Item oportet," he says (vol. i. p. 128), "quod donationem sequatur rei

(1) 15 Q. B. D. 447. (2) 2 B. & A. 551.
(3) 31 W. R. 578.

traditio, etiam in vita donatoris et donatorii; alioquin dicetur talis donatio potius nuda promissio quam donatio, et ex nuda promissione non nascitur actio, non magis quam ex nudo pacto, non enim valet donatio imperfecta, nec chartæ confectio, nec homagii captio cum omni solemnitate adhibita, nisi subsequuta fuerit seysina et traditio in vita donatoris." And again (p. 300): "Item non sufficit chartam esse factam & signatam nisi probetur donationem esse perfectam, & quod omnia, quæ donationem faciunt, ritè præcesserunt, & subsequutam esse traditionem, alioqui nunquam transferri potest res donata ad donatorium. Poterit enim homagium præcessisse, & quòd charta ritè facta sit, & vera & bona & cum solemnitate recitata & audita, tamen nunquam valebit donatio nisi tunc demum cum fuerit traditio subsequuta, & sic poterit charta esse vera, sed sine facta seysina, nuda." And to the same effect is another passage in chapter xviii., p. 310. (1)

In Bracton's day, seisin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham (Select Pleas in Manorial Courts, p. 142 (2)); see also Professor Maitland's papers on the Seizin of Chattels, the Beatitude of Seizin, and the Mystery of Seizin: Law Quarterly Rev., i., 324; ii., 484; iv., 24, 286) as to a manor or a field. At that time the distinction between real and personal property had not yet grown up: the distinction then recognised was between things corporeal, and things incorporeal: no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal: the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognised seisin as the common incident of all property in corporeal things, and tradition or the delivery of that seisin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by

(1) Item non valet donatio, nisi subsequatur traditio, quia non transfertur per homagium res data, nec per chartarum vel instrumentorum confectionem quamvis in publico fuerint recitata."

(2) Published by the Selden Society.

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word of mouth or by deed under seal. This necessity for delivery of seisin has disappeared from a large part of the transactions known to our law; but it has survived in the case of feoffments. Has it also survived in the case of gifts?

It has been suggested that Bracton, whilst purporting to enunciate the law of England, is really copying the law of Rome. But by the law of Rome, at least since the time of Justinian, gift had been a purely consensual transaction, and did not require delivery to make it perfect (Inst. ii., vii.)

Coming next to the great law-writers of the reign of Edward I., they hold language substantially the same as that of Bracton, except indeed that the difference between transactions purely voluntary, or for pecuniary consideration, appears to be growing somewhat more important. "Donatio," says Fleta, "est quædam institutio, quæ ex mera liberalitate, nullo jure cogente, procedit, ut rem a vero ejus possessore ad alium transferatur. Dare autem est rem accipientis facere cum effectu, alioquin inutilis erit donatio, cum irritari valeat et revocari." (Lib. iii., c. 3) He then proceeds to discuss various kinds of gifts, and says: "Alia perfecta, et alia incepta et non perfecta: ut si donatio lecta fuerit et concessa, et homagium captum, ac traditio nondum fuerit subsecuta." (loc. cit.; see also Lib. iii., c. 15)

In Lib. iii., c. 7, he discusses the necessary elements of donations, and, amongst other things, the effect of duress on a gift; and here the necessity of delivery is again clearly shewn, because, according to Fleta, a promise made without duress followed by delivery under duress is not a valid gift. "Refert tamen," he says, "utrum metus præveniat donationem vel subsequatur, quia si primo coactus, et per metum compulsus promisero, et postea gratis tradidero, talis metus non excusat; sed si gratis promisero et compulsus tradidero tunc excusat metus."

Britton held substantially the same language. In citing him we shall prefer the translation of Mr. Nichols to the Norman-French of the original. In his chapter on Gifts (Lib. ii., c. 3), he gives a very clear description of the nature of a gift. "A gift," he says, "is an act whereby anything is voluntarily transferred from the true possessor to another person, with the full intention that the thing shall not return to the donor, and with

full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver. For the gift cannot be properly made, if the thing given does not so belong to the receiver, that the two rights, of property and of possession, are united in his person, so that the gift cannot be revoked by the donor, or made void by another, in whom the lawful property is vested" (pp. 220, 221.)

And again (Lib. ii., c. 3):—

"Some gifts are complete, where both rights unite in the purchaser; others are begun, but not completed; and such titles are bad, as in case of gifts granted, whereof no livery of seisin follows" (pp. 225–6.)

Passages of similar import will be found in Lib. i., c. 29, and Lib. ii., c. 8.

The third writer of the age of Edward I. is one of a very different character from Fleta and Britton—we mean Horn, the author of the Mirror of Justices; he attacked the judges and the administration of the law in his days with a vehemence which it is to be hoped was undeserved. But though amongst the 155 abusions or abuses of the law which stirred his soul to wrath, some relate to seisin, yet he has nothing to say at variance with his contemporaries on the necessity of delivery; but, on the contrary, expressly affirms that "the law requires but three things in contracts: 1. The agreement of the wills; 2. Satisfaction of the donor; 3. Delivery of the possession and gift" (Chap. v., sect. 1, para. 75.)

In the reign of Edward IV. a step seems to have been taken in the law relative to gifts which resulted in this modification: that whereas under the old law a gift of chattels by deed was not good without the delivery of the chattel given, it was now held that the gift by deed was good and operative until dissented from by the donee.

Thus in Michaelmas Term, 7 Edw. 4, pl. 21, fol. 20, it was held by Choke and other justices that if a man executes a deed of gift of his goods to me that this is good and effectual without livery made to me, until I disagree to the gift, and this ought to be in a Court of Record.

In Hilary Term, 7 Edw. 4, pl. 14, fol. 29, it was alleged by

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counsel (Catesby and Pigot), that if a man give to me all his goods by a deed, although the deed was not delivered to the donee, nevertheless the gift is good, and if he chooses to take the goods he can justify this by the gift, although notice has not been given to him of the gift; and further, that if the donee commit felony before notice, &c., still the king will have the goods, and although notice may be material, nevertheless when he has notice, this would have relation to the time of the gift, &c. But the Court said that such a gift is not good without notice, for a man cannot give his goods to me against my will.

An earlier case in the same reign has been cited as bearing on the present question. In Michaelmas Term, 2 Edw. 4, pl. 26, fol. 25, a case arose on trespass of goods, in which Laicon was counsel for the defendant, and the Court was engaged in considering the sufficiency of his pleas. In the course of the discussion Laicon put this question, "Suppose I give to you my goods, which are at Everwike, and before that you are seized of them, a stranger takes them away, have you not a writ of trespass against the stranger?" Which he then proceeds to answer. "Yes, Sir, for by the gift at once the property was in you and the possession by the writ is adjudged in you presently. Danby, the Chief Justice of the Common Pleas, seems to have assented, apparently on the ground that pleading to such a writ by way of justification would confess the possession of the plaintiff and the taking by the defendant (car la si vous pled. vr. matter accord, et justif, et vous confess. prisel hors de son poss.). But immediately after this discussion Laicon found his argument so hopeless (videns opinionem curiæ contra eum) that he seems to have amended his pleadings.

This case seems to us of no authority on the point under investigation. What was said was not in discussion of what really passed by the gift, but only of the effect of pleading in preventing the denial of the plaintiff's possession. The question seems to relate to an effectual gift of goods without possession, but there is nothing to shew whether the parties to the discussion had in contemplation a gift by deed or not. The cases already referred to which occurred a few years later seem to shew that the effect of a deed in passing the property without delivery of

the chattel was claiming the attention of the lawyers of that day.

Brooke, in his Abridgment (Trespass, 303), cites this case of the 2 Edw. 4, and seems to put it upon a somewhat different ground to the Year Book itself. He says that Danby agreed in Laicon's argument, "for by the gift the property is in him, and then the law adjudges possession, which was not denied, and it seems to be the law, because goods are transitory whilst land is local." We can find no authority for these reasons in the entry which he professes to be abstracting.

This case, as explained by Brooke, seems to underlie the proposition asserted twice in the case of *Hudson* v. *Hudson* (1), discussed in 2 Wms. Saunders, 47, a., to illustrate the right of an executor to sue in trover before actual possession. If, it was said, a man in London gives to me his goods in York and another take them I can bring trespass; for property, it was added, draws possession in chattels personal. The Court were not considering what gift of chattels did carry the property, but only illustrating the proposition that where the property has passed, as by the will to the executor, there the law attracts to it possession. This would be perfectly illustrated by the case of chattels in York transferred by deed executed in London. The whole supposition that this case lends any countenance to the notion that chattels can pass without delivery seems to be derived from the silence of the case as to the way in which the gift was made: and this point was not material to the matter under consideration by the Court. Moreover, where a legal result could only be produced by a deed, our elder law-writers were, we believe, less apt to mention the deed than their less technical descendants.

One other case in the reign of Edward IV. must be mentioned. In Michaelmas Term, 21 Edw. 4, pl. 27, fol. 55, it was said by Brian, J., that in detinue of chattels it was a good plea to say that the plaintiff after the bailment gave them to the defendant and then he could have his law—quod fuit concessum. The case appears to go only to this, that if A. after bailing a chattel to B. then gives it to B., B. might defend himself by his suit in

(1) Latch. 214, 263.

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an action of detinue. If good law, it seems to establish that delivery first and gift afterwards is as effectual as a gift first and delivery afterwards.

One case in the reign of Henry VII. perhaps requires consideration (Hilary Term, 21 Hen. 7, pl. 30, fol. 18). The question seems to have been whether the use of land was presently transferred by a bargain and sale, and in the course of the report the following passage occurs: "If I give to a man my cow or my horse, he may take the one or the other at his election: and the cause is that immediately by the gift the property is in him, and that of the one or the other at his will; but if the case were that I will give to him a horse or a cow in future time, then he cannot take either the one or the other, for then it is in my election to choose which of them I will give him." The case is interesting as the first one which we have found which emphasizes the distinction in gifts between words in the present and in the future tense. But the passage we have cited appears to have no real weight of authority. It is only part of the argument of the Attorney-General, and the argument does not appear tenable; for surely it is open to question whether the gift, even a grant for valuable consideration, of one or other of two things at the election of the donee or grantee can pass the property in one or other or both of these things immediately and before the election of the grantee. It is further to be observed that the question before the Court turned on the doctrine of election; and whether the supposed gift was to be by deed or not is a point on which the report is silent. This silence is the only reason why the passage has been thought by some persons relevant to the present inquiry.

It was in the reigns of the early Tudors that the action on the case on indebitatus assumpsit obtained a firm foothold in our law; and the effect of it seems to have been to give a greatly increased importance to merely consensual contracts. It was probably a natural result of this that, in time, the question whether and when property passed by the contract came to depend, in cases in which there was a value consideration, upon the mind and consent of the parties, and that it was thus gradually established that in the case of bargain and sale of

personal chattels, the property passed according to that mind and intention, and a new exception was thus made to the necessity of delivery.

This doctrine that property may pass by contract before delivery appears to be comparatively modern. It may, as has been suggested, owe its origin to a doctrine of the civil law that the property was at the risk of the purchaser before it passed from the vendor; but at any rate the point was thought open to argument as late as Elizabeth's reign (see Plowd. 11 b., and see a learned note, 2 Man. & Ry. 566).

*Flower's Case* (1) (which seems to have been decided in 39 Elizabeth (see p. 59)), appears to shew that the necessity of delivery was then upheld by the Court. The case is thus stated by Noy (p. 67):—

"A. borrowed one hundred pound of B. and at the day brought it in a bagg and cast it upon the table before B. and B. said to A. being his nephew, I will not have it, take it you and carry it home again with you. And by the Court, that is a good gift by paroll, being cast upon the table. For then it was in the possession of B. and A. might well wage his law. By the Court, otherwise it had been, if A. had only offer'd it to B. for then it was chose in action only, and could not be given without a writing."

The Court seems to have held that delivery was necessary, but that by the casting of the money on the table it came into the possession of the uncle, and that the nephew taking the money in his uncle's presence and by his direction, there was an actual delivery by the uncle to the nephew—so that the nephew might wage his law, i.e., might conscientiously swear that he was not indebted to his uncle (see the case discussed in *Douglas* v. *Douglas*). (2)

In Jenkins's Centuries (3rd Century, Case ix.), it is said: "A gift of anything without a consideration is good: but it is revocable before the delivery to the donee of the thing given. Donatio perficitur possessione accipientis. This is one of the rules of law":—a statement made with little reference to the other matters treated of in the case. We know of no other

(1) Noy. 67. (2) 22 L. T. (N.S.) 127.

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authority exactly to the same effect as this, nor is it stated as having the authority of any judicial decision.

Blackstone's discussion of the subject of gifts of chattels is perhaps not so precise as might be desired; but his language does not seem to us essentially to differ from the earlier authorities: "A true and proper gift or grant is," he says, "always accompanied with delivery of possession and takes effect immediately" "But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract: and this a man cannot be compelled to perform" (Book 2, c. 30).

In 1818 the year before *Irons* v. *Smallpiece* (1) was decided, the then Master of the Rolls, Sir Thomas Plumer, in *Hooper* v. *Goodwin* (2) said: "A gift at law or in equity supposes some act to pass the property: in donations inter vivos . . . . if the subject is capable of delivery, delivery."

These are, so far as we can find, all the relevant authorities before the decision in *Irons* v. *Smallpiece* (1), though they are not all the authorities that have been cited as relevant. But several that have been relied upon appear to us to have no real bearing on the point at issue. Thus in *Wortes* v. *Clifton* (3), Coke arguendo uses as an illustration of the difference between the Civil law and ours—that in the Civil law a gift is not good without tradition—but that it is otherwise in our law. Here for aught that appears, the gift which the learned counsel referred to as good without delivery is a gift by deed.

In like manner several authorities which affirm that a gift of chattels may be good without deed and are silent as to delivery (Perkins' Profitable Book, Grant, 57; 2 Shep. Touchs. 227; Comyn Digt. Biens D. 2) have been cited as if they likewise asserted that a gift was good without delivery—a proposition which they do not affirm, or, as we think, imply.

This review of the authorities leads us to conclude that according to the old law no gift or grant of a chattel was effectual to pass it whether by parol or by deed, and whether with or without consideration unless accompanied by delivery: that on that law

(1) 2 B. & A. 551. (2) 1 Sw. 485, 491.
(3) Roll. 61; Mich. 12 James 1.

two exceptions have been grafted, one in the case of deeds, and the other in that of contracts of sale where the intention of the parties is that the property shall pass before delivery: but that as regards gifts by parol, the old law was in force when *Irons* v. *Smallpiece* (1) was decided: that that case therefore correctly declared the existing law: and that it has not been overruled by the decision of Pollock, B., in 1883, or the subsequent case before Cave, J.

We are therefore unable in the present case to accept the law on this point as enunciated by Lopes, L.J., in deference to the two latest decisions.

But assuming delivery to be necessary in the case of the gift of an ordinary chattel, two questions would remain for consideration in the present case—the first, whether the undivided fourth part of the horse admits of delivery, or whether on the other hand it is to be regarded as incorporeal and incapable of tradition; the other, whether the letter written by Benzon to Yates was either a constructive delivery of this undivided fourth part of the horse, or an act perfecting the gift of this incorporeal part so far as the nature of the subject-matter of the gift admits. On these points we do not think it needful to express any decided opinion, because in our judgment what took place between Benzon and Cochrane before Benzon executed the bill of sale to Cochrane, constituted the latter a trustee for Moore of one-fourth of the horse Kilworth.

Another objection to Cochrane's title was based on the bill of sale, which bore date July 26, 1888, and stated the consideration as a sum of 7575*l.* then owing by Benzon to Cochrane, and of the further sum of 2425*l.*, then paid by Cochrane to Benzon, making together a sum of 10,000*l.*; whereas in fact at the date of the bill of sale Benzon was only indebted to Cochrane on two promissory notes then current and payable respectively in August and September, and for sums amounting together to 8300*l.* It is said that by an agreement arrived at at the time, this 8300*l.* due in future was to be taken as between the parties as represented by the sum of 7575*l.*; but if so, this agreement should in our opinion have been stated in the bill of sale, and we are therefore

(1) 2 B. & A. 551.

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of opinion that the document was void as not truly stating the consideration for which it was given.

For these reasons we are of opinion that this appeal should be dismissed with costs.

LORD ESHER, M.R. In my opinion, it always was the law of England that an owner of a chattel could transfer his ownership thereof to another person by way of exchange or barter, or by way of bargain and sale for a consideration, or by way of and as a mere gift, or by will. Once conclude that such was always the law, and it follows that it is the common law. That law could not and cannot be altered by mere judicial decision, but only by Act of Parliament. The authority of any judicial decision to the contrary would be overruled at any time, however remote, by a competent Court. But each of the above propositions is a fundamental proposition of law, i.e., a proposition which is not evidence of some other proposition which has to be proved, but a proposition the existence of which—i.e., the facts necessary to constitute which—is to be proved by evidence. The moment those facts are proved the proposition of law is proved, to which the legal tribunal will give effect. Although no Court can properly alter such a fundamental proposition, the amount or nature of the evidence which will satisfy a Court of the existence of such a proposition, as applicable to a particular case, may vary, and has varied, at different epochs. I have no doubt that in every one of the propositions above enumerated, unless it be in the case of a gift by will, there was a time when, as part of the evidence of the existence of the proposition in a particular case, the Courts always required that there should have been an actual delivery of the chattel in question. Though there was proof of a contract for good consideration, in a form which would now pass the property in a chattel without delivery, proof of actual delivery was required. Though the transfer was contained in a deed, proof of actual delivery was required. Equally the statement that one had declared in mere writing or in words that he did then, at the moment, transfer, without consideration, his chattel to another, and that the other did at the same moment state in writing or in words that he accepted such transfer, was

not acted upon by the Courts as proof of a gift executed, without proof also of an actual delivery. The evidence required in all cases was not complete without proof of an actual delivery. But in some of the cases the Courts undoubtedly do not now require proof of an actual delivery. They do not require that piece of evidence. They do not in the case of a transfer by deed, or in the case of a transfer by a contract for good consideration, shewing in its terms an intention that the ownership should pass at once before or without immediate delivery. If I thought that there was not a difference between those cases and the case of what has been called a gift in words by the donor, and an acceptance in words by the donee of a chattel, I should be strongly inclined to think that, even though the Courts would have required in such case proof of an actual delivery, up to and including the case of *Irons* v. *Smallpiece* (1), the Courts might now in such case, as former Courts did in the other cases, be satisfied by other evidence of the gift by the one and the acceptance of the gift by the other, which are the facts which constitute the proposition of a transfer of ownership of a chattel by way of and as a gift.

Up to the time of *Irons* v. *Smallpiece* (1), and afterwards, I have no doubt the Courts did require proof of an actual delivery in such a case. Upon long consideration, I have come to the conclusion that actual delivery in the case of a "gift" is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence. The proposition is not—that the one party has agreed or promised to give, and that the other party has agreed or promised to accept. In that case, it is not doubted but that the ownership is not changed until a subsequent actual delivery. The proposition before the Court on a question of gift or not is—that the one gave and the other accepted. The transaction described in the proposition is a transaction begun

(1) 2 B. & A. 551.

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and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do. The one cannot give, according to the ordinary meaning of the word, without giving; the other cannot accept then and there such a giving without then and there receiving the thing given. After these two things done, the donor could not get possession of the chattel without bringing an action to force the donee to give it back. Short of these things being done, the donee could not get possession without bringing an action against the donor to force him to give him the thing. But if we are to force him to give, it cannot be said that he has given. Suppose the proposing donor offers the thing saying, "I give you this thing—take it"; and the other says, "No, I will not take it now; I will take it to-morrow." I think the proposing donor could not in the meantime say correctly to a third person, "I gave this just now to my son or my friend." The answer of the third person would (I think rightly) be: "You cannot say you gave it him just now; you have it now in your hand." All you can say is: "That you are going to give it him to-morrow, if then he will take it." I have come to the conclusion that in ordinary English language, and in legal effect, there cannot be a "gift" without a giving and taking. The giving and taking are the two contemporaneous reciprocal acts which constitute a "gift." They are a necessary part of the proposition that there has been a "gift." They are not evidence to prove that there has been a gift, but facts to be proved to constitute the proposition that there has been a gift. That being so, the necessity of their existence cannot be altered unless by Act of Parliament. For these reasons, I think that the decision in *Irons* v. *Smallpiece* (1) cannot be departed from, and I cannot agree with the decisions, which have been cited to us, of Pollock, B, and Cave, J.

I think, therefore, that we cannot agree with the main reason given by Lopes, L.J., for his decision in the present case, which

(1) 2 B. & A. 551.

he gave because he thought that, sitting as a judge of the Queen's Bench Division, he ought to follow the later decisions. His own opinion was in favour of maintaining *Irons* v. *Smallpiece*. (1) But I do entirely agree with what I understand was another ground on which he was prepared to decide this case, and which he found, as a fact, existed in this case, namely, that the deed on which the claimant's case rested was obtained by a fraudulent misrepresentation, and was repudiated by the giver of it as soon as he discovered the fraud.

For this reason, and the others mentioned by my brother Fry, I think the appeal must be dismissed. I wish to say that I am not prepared to differ in any respect from the judgment of my learned brothers; but I wish to add my own particular reason.

*Appeal dismissed.*

Solicitors for plaintiff: *Cooper & Sons.*
Solicitor for defendant: *A. E. Sidney.*

A. M.

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BISHOP AND OTHERS *v.* THE BALKIS CONSOLIDATED COMPANY, LIMITED.

*March* 29, 31; *April* 25.

*Company—Sale of Shares—Certification of Transfer—Voucher of Title—Want of Title in Transferor—Estoppel—Act Ultrà vires—Representation as to Credit or Ability—Signature of Party to be Charged—Lord Tenterden's Act*, 9 *Geo.* 4, c. 14, s. 6.

The defendants were a company, incorporated under the Joint Stock Companies Acts, who had issued the whole of their authorized share capital. Subsequently to the completion of such issue L. sold to the plaintiffs, through stockbrokers, a certain number of shares in the defendant company. The brokers took the document, by which it was intended to transfer such shares from L. to the plaintiffs, before it had been executed by the plaintiffs or the price had been paid, to the office of the defendants, and procured the defendants to place upon it (partly by means of a stamp, partly in writing) the following words: "Certificate lodged. The Balkis Consolidated Company, Limited. J. V. Thomas, for Secretary." The placing of such words upon a transfer was commonly known as "certification" of the transfer; and it was in the ordinary course of the defendants' practice to grant such certification, if required to do so and if satisfied that the transferor was entitled to the shares specified in the transfer. The brokers, having obtained

(1) 2 B. & A. 551.

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such certification and acting upon the faith of it, as the agents of the plaintiffs paid L. the price of the shares. The defendants subsequently discovered that L. had had no title to the shares specified in the transfer, and thereupon, notwithstanding their certification of the transfer, refused to recognise the plaintiffs' title to the shares. The plaintiffs having brought an action to recover the value of the shares, the judge found as a fact that the certification of the transfer was a representation by the defendants that a genuine certificate, covering the shares denoted by the numbers in the transfer, had been lodged with them, and that L. had a good title to the shares, and further that such representation was made with the intent that a subsequent purchaser of the shares should act upon it:—

*Held*, that the action could not be maintained, upon the grounds—

1. That the certification was ultrà vires, and

2. That it was a representation as to the credit and ability of L. within the 6th section of Lord Tenterden's Act, and, not being under the seal of the defendants, could not bind them.

ACTION tried at the Birmingham Assizes before Vaughan Williams, J., without a jury.

The action was brought to recover the value of 195 shares in the defendant company. The plaintiffs were a Mr. Bishop, the purchaser of certain shares hereinafter mentioned, and a firm of the name of Messrs. Cuthbert, to whom, as the nominees of Bishop, the said shares were transferred to hold on Bishop's behalf. The defendants were a company, incorporated under the Companies Acts, who had prior to the year 1889 issued the whole of their authorized share capital.

The statement of claim alleged that the defendants had certified upon a certain transfer, presented to them for that purpose, that a certificate of the shares specified in such transfer had been lodged with them, and that the plaintiff Bishop, relying on the said certification, purchased the said shares; that the defendants issued to the plaintiffs Messrs. Cuthbert, as the nominees of the plaintiff Bishop, a certificate for the shares, and afterwards refused to recognise either Bishop or Messrs. Cuthbert as the owners of the shares, or to permit them to transfer the same.

It appeared that in January, 1889, one Powter transferred 1000 shares in the defendant company to one Balfour, who was accordingly placed on the register as the owner of such shares, and continued to be so registered during the whole period hereinafter mentioned. Between February and May the plaintiff

Bishop purchased through his stockbrokers, Messrs. Blythe & Hutchinson, 200 shares in the defendant company, but the contracts of purchase of such shares were carried over till the end of June. In the early part of June a transfer of 1000 shares, purporting to include the numbers of 135 of the shares already standing in Balfour's name, and purporting to be made by the said Powter to one Lupton, was left by a clerk of Messrs. Blythe & Hutchinson with the defendants for registration, and in exchange a receipt for the transfer was given. On June 29 Messrs. Cuthbert, on Bishop's behalf, took up the contracts by which he had purchased the 200 shares, and transfers of 200 shares to them were prepared in lots of 135 shares, 60 shares, and 5 shares respectively. In the transfer of the lot of 135 shares Lupton was named as the transferor, and the numbers of the shares specified on the transfer were identical with the numbers of the 135 shares already mentioned as parcel of the 1000 shares standing in Balfour's name. In the transfers of the lots of 60 shares and 5 shares other parties appeared as the transferors. On July 4 the transfer receipt, Powter to Lupton, was taken back to the defendants by Messrs. Blythe & Hutchinson, when in exchange for it a clerk of the defendants, of the name of Thomas, gave them a "certification" upon the transfer of the said 135 shares by Lupton to Messrs. Cuthbert which was then tendered to him for that purpose. The certification consisted in placing upon the transfer, partly by means of a stamp, partly in writing, the following words: "Certificate lodged. The Balkis Consolidated Company, Limited. J. V. Thomas, for Secretary."

It was in the ordinary course of the defendants' practice to grant such certification, if they were satisfied that the transferor was entitled to the shares specified in the transfer. Messrs. Blythe & Hutchinson, having obtained such certification, on behalf of the plaintiffs paid Lupton 38*l.* 13*s.*, the price of the 135 shares. The other two lots of 60 shares and 5 shares were duly paid for and transferred, and no question as to the validity of such transfers arose in the action. In August a certificate for 195 shares, covering the said 135 and 60 shares, was issued under the seal of the defendants in favour of Messrs. Cuthbert, as the

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nominees of the plaintiff Bishop. For the remaining 5 shares a separate certificate was issued.

In September the plaintiff Bishop sold 100 shares to one Watson, and a transfer, covering 100 of the said 195 shares, and expressed to be by Messrs. Cuthbert to Watson, was sent to the defendants for certification. On October 4 the defendants refused to certify such transfer, on the ground that Lupton had never been entitled to the said 135 shares, certain of which were included in the transfer by Messrs. Cuthbert to Watson, and that the plaintiffs could not claim through him in respect of them. They were, however, willing to certify and register a transfer of the 60 shares to Watson, if a separate transfer for the 60 shares were presented to them for that purpose.

*J. Dugdale, Q.C.*, and *Hugo Young*, for the plaintiffs.
*H. D. Greene, Q.C.*, and *A. T. Lawrence*, for the defendants.

April 25. VAUGHAN WILLIAMS, J. In this case the plaintiff Bishop, between February and May 25, 1889, made certain purchases of Balkis shares, amounting in all to 200, through stockbrokers, members of the London Stock Exchange, of the name of Blythe & Hutchinson. These contracts of purchase of Balkis shares were carried over from time to time till June 29, when they were taken up by the plaintiffs, Messrs. Cuthbert of Birmingham, as the nominees of Mr. Bishop. Messrs. Cuthbert are stockbrokers, but not members of the London Stock Exchange, and were willing to carry over at a less rate than the London brokers. The money for taking up the shares was not provided by Cuthberts, but by Bishop, who, however, was credited by Cuthberts in account current with the amount so paid by him for the purpose of taking up the shares.

The facts as to the taking up the shares seem to have been the following:—

Some time in June a clerk of Blythe & Hutchinson of the name of James Comfer took to the offices of the Balkis Company, Limited, which was stated to be a company which had issued the whole of its share capital, a transfer of 1000 shares by Powter to Lupton, which he delivered up to the company in ex-

change for transfer receipts, and on July 4 went back to the office of the company with these transfer receipts, and in exchange got certification on a transfer by Lupton to Cuthberts. The words of certification were, "Certificate lodged. The Balkis Consolidated Company, Limited. J. V. Thomas, for Secretary." All these words, except the signature "J. V. Thomas" and the word "for," were printed with an impressed stamp. Hutchinson, the employer of Comfer, was acting as the agent of Lupton, the vendor, in getting the certification of this transfer.

Hutchinson, having obtained the certification on July 8, as the agent of Bishop, paid Lupton 38*l.* 13*s.*, the price of the shares, and was repaid by Bishop on July 11. Hutchinson having in the meanwhile on July 8 or 9 sent to Cuthberts the transfer, Lupton to Cuthberts, with the certification on it, Cuthberts sent up this transfer to the company on July 11 for registration, and it appears by the company's receipt on the transfer that the company received the transfer for registration on July 11, and registered the transfer on the 22nd of that month; but the payment of Bishop's cheque was in no sense made on the faith of the company's receipt of July 11. These seem to be the whole of the material facts so far as they relate to the transfer to Cuthberts as the nominees of Bishop and the payment of the price by Bishop; and the outcome seems to be that the company, having issued transfer receipts to Lupton in respect apparently of a certified transfer by Powter to Lupton, then at the request of Hutchinson, as the agent of Lupton, certified on the face of a transfer by Lupton to Cuthberts that the certificate covering the shares denoted by numbers in the transfer had been lodged with the company. At the time when this certification was given the transfer had not been executed by any transferee, nor had any money been paid on account of the transfer. Hutchinson seems to have been broker for both vendor and purchaser; but I find, as a fact, that he presented the transfer for certification as the agent of Lupton, the vendor, and that he made the payment as the agent of Bishop, the purchaser, and made such payment against and on the faith of the certification.

The company, having registered the transfer on July 22, proceeded on August 6 to seal certificates in favour of Messrs.

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Cuthbert, and on August 22 sent the certificate to Messrs. Cuthbert. Bishop does not seem to have seen this certificate until after September 20, when he sold 100 Balkis shares to Watson. On October 1, Cuthberts sent to the company the certificate, and the transfer, Cuthberts to Watson, for certification, and on October 4 the company refused to certify the transfer of the whole of the shares on the ground that Cuthberts were not entitled to 135 of the shares in question.

Now, on these facts, the first question which arises is whether Bishop, independently of the issue of the share certificates to Cuthberts, has any cause of action against the company, by reason of the certification of the transfer, Lupton to Cuthberts, and the payments made on the face of it. If there is a cause of action it is because Bishop acted upon the faith of the representation made by the company in certifying the transfer; and assuming that Bishop would have a cause of action if the transfer had purported to be to him, it makes, in my opinion, no difference that the transfer purported to be to Cuthberts as his nominees and not to himself. The damage sustained by Bishop in either case is precisely the same. Now, in order that Bishop should have a good cause of action it is necessary first that the company should by certification of the transfer have represented that a genuine certificate covering the shares in question had been lodged with them. As to this I find, as a matter of fact, that this is the meaning of the certification. Secondly, it is essential to the cause of action that the certification should have been made in order that a subsequent purchaser might act upon it. I find as a fact that it was so made; the transfer mentions Cuthberts as the transferees, but the representation in my opinion was made as much to Bishop, the undisclosed principal of Cuthberts, as to Messrs. Cuthbert. Thirdly, it is essential to the cause of action that Bishop should have sustained damage by acting on this representation of the company; it seems clear that Bishop did sustain damage to the extent of 38*l.* 15*s.*, which Hutchinson, the broker, paid on the faith of the certification. It was urged in argument that there was another condition essential to the cause of action, viz., that the representation of the company should have been made in the course of some duty owing by the com-

pany; but I do not think that is so; it is sufficient in my opinion that the company chose, for the purpose of making the shares of its members more marketable, to supplement certificates with this sort of certification, with the intention that such certification should be treated by buyers as a voucher of title. It is true that in the judgments of Cockburn, C.J., and Blackburn, J., in *In re Bahia and San Francisco Ry. Co.* (1) some stress is laid upon the fact that there was a statutory obligation on the company to issue the certificates which raised the estoppel in that case; whereas in the present case there is no duty, statutory or otherwise, to impress certification on the transfers; but if the judgment and the observations of the judges during the argument are looked at, it will be seen that the mention of the statutory duty is not as an essential of the estoppel, but merely for the purpose of pointing out that the declaration contained in the certificate is intended, not only as a voucher as between the company and its members, but also as a voucher to the public at large who might wish to deal with the shareholder. Duty is essential to an action of negligence or estoppel by reason of negligence, but not to an action claiming compensation for damages sustained by acting on representations made for the purpose that they should be acted on. It is, however, urged on behalf of the Balkis Company that the giving of these certifications is ultrà vires, and that the directors themselves, and a fortiori, the clerk of the directors, have no authority to give such certifications. If I were free to decide this case according to my own view of the law, I should hold the defendants estopped, and should hold that the giving of such certifications was not ultrà vires. The certifications are merely representations made in the ordinary course of business by the company in respect of a matter as to which the company had a statutory duty and statutory authority, namely, the issue of certificates; and can only be ultrà vires in the sense that a letter addressed to the transferor would be stating that he had lodged such and such a certificate with the company.

But even assuming that the certification is a representation by a clerk made in the course of business so as to bind the company,

(1) Law Rep. 3 Q. B. 584.

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recognised in *Swift* v. *Jewsbury* (1), and acted on in *Shaw* v. *Port Philip Gold Mining Co.* (2), yet the effect of the case of *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3) would seem to be that the company is not liable, by reason that the company have no power to bind themselves to the consequences of any such answer, because, if the company could so bind themselves the company would be estopped from denying the existence of the certificate referred to in the certification, and no corporate body can be bound by estoppel to do something beyond its powers. The present case does not, of course, fall within the *Charnwood Forest Ry. Co.'s Case* (3) so far as the facts are concerned, because there was no evidence nor suggestion before me that the clerk of the defendant company was acting for his own benefit in making the certification, but it does seem to me to fall clearly within the principle of that decision. I am afraid that I do not quite understand the judgment in the *Charnwood Forest Ry. Co.'s Case* (3), because I find it difficult to assent to it, and because I cannot reconcile the doctrine as to estoppel against corporations contained in those judgments with the doctrine laid down by the Court of Queen's Bench in *In re Bahia and San Francisco Ry. Co.* (4), for it seems to me that the Bahia and San Francisco Railway Company had no power, under the 25th section of the Companies Act, 1862, or otherwise, to issue shares beyond the limit in the special Act, any more than the Charnwood Forest Railway Company had to issue the debentures, and that although the 31st section empowers and casts on companies created under the Companies Acts the duty of issuing certificates specifying shares held by any member of the company, yet this power or duty does not enable the company to issue certificates in respect of shares which have not in fact been issued by the company. It is clear, however, that the Court of Appeal did not mean to overrule *In re Bahia and San Francisco Ry. Co.* (4), which was not mentioned in the argument or judgments, and although it might well be argued from that case that as a company can estop itself, by the issue of a certificate, from denying, for the purpose of an action for damages, the genuineness of shares which it had

(1) Law Rep. 9. Q. B. 301.
(2) 13 Q. B. D. 103.
(3) 18 Q. B. D. 714.
(4) Law Rep. 3 Q. B. 584.

no power to issue, so a company may by representations made on its behalf by its officers estop itself by denying that such a certificate has been issued, and it will be observed from an observation made by Lush, J., in that case that he seems to have considered that the estoppel might have been raised as well by writing a letter as by issuing a certificate; yet on the whole I think that the statutory power and duty to issue certificates distinguish the two cases, and I have no right, whatever I may think of the decision, to disregard what seems to me the spirit of the decision in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (1)

It is further urged that the company is not liable, because the certification, being a representation as to credit within 9 Geo. 4, c. 14, could not bind the company unless under the seal of the company. The case of *Swann* v. *Phillips* (2), shews that a representation as to the possession by *the party making the representation* of title deeds of a person seeking to get credit on the faith of the title deeds may be a representation within the statute, if the representation is made for the purpose that the owner of the title deeds may be trusted, and it is extremely difficult to say that a representation, which is made for the purpose of giving the holder of shares facilities for dealing with and transferring his shares, is not a representation made concerning the credit, ability or dealings of the shareholder. It is clearly a representation made as to his ability to transfer, and made for the purpose of enabling the shareholder to obtain payment of the price of the shares purported to be transferred.

Upon the ground therefore, that the facts of this case bring it within the principle of the decision in the *Charnwood Forest Ry. Co.'s Case* (1), and also upon the ground that the representation contained in the certification is a representation as to the ability, credit or dealings of the person for whom credit is sought, I hold, so far as the issue of the certification is concerned, that although I have found in fact that the certification was made for the purpose of being acted upon, and was made to the broker as the agent of the vendor Lupton, and although I find that the money was paid on behalf of Bishop upon the faith of that certi-

(1) 18 Q. B. D. 714. (2) 8 A. & E. 457.

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fication, and that Bishop has been damaged to the extent of 38*l.* 15*s.*, yet I feel bound to come to the conclusion that for the reasons I have given the company are not liable.

So far I have dealt with the case independently of the issue of the certificates. I have said during the course of the trial that I thought any amendment ought to be made which was necessary to raise the question between the parties as appears by the evidence taken before me; but I am of opinion that the issue of the certificates gives no cause of action whatever to Bishop or to Cuthberts, because in my opinion neither Bishop nor Cuthberts, upon the evidence before me, sustained any damage whatever, or altered their position in any respect to their detriment by reason of the issue of those certificates, and I do not see that any amendment which could be made would assist the plaintiffs, or either of them, in this respect. It may very well be that Bishop in point of fact was damaged, because Bishop may have had to pay damages to Mr. Watson, the person to whom he sold in October, 1889; but there is no evidence before me of Bishop having to pay any such damages or having sustained any damage by reason of his non-performance of that contract. Throughout the observations that I have been making I have been dealing merely with the 135 shares. I have now to deal with the sixty shares, and so far as the sixty shares are concerned I find upon the evidence before me that there never was a refusal in respect of the sixty shares. It seems to me that what the plaintiffs demanded was that they should have the company act upon the certificate in respect of the sixty shares, and also in respect of the 135 shares, and that in so doing they were asking for that which they were not entitled to ask for. Under these circumstances my judgment will be for the defendants with costs.

*Judgment for the defendants.*

Solicitors for plaintiffs: *Woodcock, Ryland & Parker, for Rowley & Chatwin, Birmingham.*

Solicitors for defendants: *Stretton, Hilliard, Dale & Newman.*

J. F. C.

## BOOTH *v.* FERRETT.

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*May* 13, 14.

*Common Lodging House—Liability to Penalty for keeping—Charitable Institution—Non-registration—Common Lodging Houses Act,* 1851 (14 & 15 *Vict. c.* 28)—*Common Lodging Houses Act,* 1853 (16 & 17 *Vict. c.* 41).

Sect. 3 of the Common Lodging Houses Act, 1853, provides that "a person shall not keep a common lodging house or receive a lodger therein until the house has been inspected and approved for that purpose by some officer appointed in that behalf by the local authority, and has been registered."

The appellant opened and kept a lodging house for the reception of male lodgers, who slept in one common room capable of accommodating 100 persons. The lodgers were charged, at the discretion of the manager, a sum not exceeding 4*d.* per night for bed, supper, and breakfast; but the house was maintained, not for the purpose of gain, but for the accommodation of the poorest class of persons only, partly with a charitable and partly with a religious object. The house had not been inspected or approved by the officer of the local authority, nor was it registered. The appellant having been summoned and convicted for keeping a common lodging house in contravention of the provisions of the above section:—

*Held*, that the house, being maintained as a charitable institution and not for purposes of gain, was not a common lodging house within the meaning of the Act, and that the conviction could not be supported.

CASE stated by a metropolitan police magistrate.

In and from October, 1889, the appellant opened and kept open a house for the reception of male lodgers, of the poorest class, to sleep in one common room for one or more nights, and to be supplied with food in the same and another common room, at an inclusive charge of 4*d.* per night for bed, supper, and breakfast. There was accommodation for 100 men, and as many as sixty-nine were on one night found sleeping in the common room. The sum of 4*d.* was paid for the accommodation by such as had 4*d.* to pay, and a smaller sum was paid if they had less; while free tickets were given to persons without means, at the discretion of the person in charge, such free tickets being paid for by charitable friends of the institution. The person in charge also exercised his discretion in refusing to admit persons who were, in his opinion, able to pay more than 4*d.* for their night's accommodation. The rooms were opened for lodgers at five o'clock each evening, supper given at seven, and a religious service held at eight. The appellant having been summoned for

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keeping an unregistered common lodging house, in breach of the provisions of s. 3 of the Common Lodging Houses Act, 1853, the magistrate found as a fact that the lodging house was maintained not for any primary purpose of gain, but for the accommodation of the poorest class of persons only, partly with a charitable and partly with a religious object; but he, nevertheless, held that it was a common lodging house within the meaning of the Act, and convicted the appellant, subject to a case for the opinion of the Court.

*Willis, Q.C.* (*Colam*, with him), for the appellant. The Common Lodging Houses Acts, 1851 and 1853, contain no definition of a common lodging house. This was not a common lodging house in the ordinary sense of the term. First, it was not open to all persons—females were not admitted; and the manager had a discretion as to what men he would admit. By a common lodging house is meant "one that is open to all comers": see per Lindley, J., in *Langdon* v. *Broadbent*. (1) Secondly, it is essential to the notion of a common lodging house that it should be kept for purposes of gain, which this house was not.

*R. S. Wright*, for the respondent. The test whether a house is a common lodging house is not whether it is open to all members of the public, but whether such persons as are admitted sleep in a common room. The fact that the house was not kept for purposes of gain is immaterial, for the Act is a sanitary Act. If large numbers of persons of the poorest class are allowed to herd together in a common sleeping room without supervision they are likely to bring about those insanitary conditions which it was the object of the statute to prevent. The liability to spread infectious disease cannot depend upon the question of payment.

LORD COLERIDGE, C.J. In the absence of any definition of a common lodging house in the Common Lodging Houses Acts, it is necessary to look at the intention and object of those Acts to see what was the kind of lodging house that was there dealt with. Now, these Acts contain certain regulations which are exceed-

(1) 37 L. T. (N.S.), at p. 436.

ingly stringent, though highly proper for the regulation of lodging houses open to all persons and kept for purposes of gain. For it is not altogether unnatural that a person who keeps a lodging house as a commercial business should endeavour to make as much money out of it as possible, even though his so doing may result in overcrowding and want of cleanliness which may be productive of great disaster to the community. And Parliament has established these regulations with a view to preventing the existence of such dangerous conditions. But a lodging house such as that which we have to deal with here —a charitable institution, not kept for purposes of gain, not open to everybody, but open only to such persons, under such conditions, and at such times as the keeper of it chooses—is not liable to the dangers against which the statutes were directed. Nor is this a common lodging house in the ordinary acceptation of the term. No person has a right to go there, money in hand, and claim admittance. On the whole, therefore, I come to the conclusion, though not with any great degree of confidence, that this is not a common lodging house within the meaning of the Acts, and that the conviction must consequently be quashed.

MATHEW, J. I am of the same opinion. This institution is a totally different thing from a common lodging house in the ordinary sense of that term. A common lodging house, in its ordinary sense, means a lodging house kept by somebody for the purpose of profit, and open to all comers whether of a certain class or not. It is to lodging houses of that description that the legislature has confined itself. But this particular institution presents neither of those conditions.

*Conviction quashed.*

Solicitors for appellant: *Ranger, Burton, & Matthews.*
Solicitor for respondent: *Solicitor to the Treasury.*

J. F. C.

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May 3, 5.

[IN THE COURT OF APPEAL.]

PARTRIDGE *v.* THE GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION OF THE UNITED KINGDOM.

*Dentists Act,* 1878 (41 *&* 42 *Vict. c.* 33), *s.* 11 (5) *and* 13—*Discretionary and quasi judicial functions—Ministerial Act—Erasing name from Dentists Register, liability to Action for—Erroneous exercise of Discretion without Malice.*

Under the Dentists Act, 1878, s. 11, a register is to be kept by the general registrar to be styled the dentists register; and by sub.-s. (5) of the section, every registrar is in all respects in the execution of his discretion and duty in relation to any register under the Act to conform to any orders made by the General Council under the Act and to any special directions given by the General Council. By s. 13 of the Act power is given to the General Council (inter alia) to cause the name of a person who has been guilty of infamous or disgraceful conduct in a professional respect to be erased from the register.

The plaintiff's name had been entered on the dentists register in respect of a diploma in dental surgery conferred upon him by the Royal College of Surgeons in Ireland. Such diploma was afterwards withdrawn on the ground that the plaintiff had advertised in connection with his profession in breach of an undertaking not to do so given by him when his diploma was granted. The defendants, the General Council, on being informed of such withdrawal, and its cause, without calling on the plaintiff for explanation, directed the registrar to remove the plaintiff's name from the dentists register. On an application for a mandamus to restore his name, it was held that the defendants had acted erroneously and that his name must be restored. The plaintiff then brought his action for wrongfully removing his name from the register:—

*Held,* that the functions exercised by the General Council under the above-mentioned sections respectively being discretionary, not merely ministerial, whether they acted under s. 13 or under s. 11, sub-s. 5 only, they were not liable to an action for the erroneous exercise of their discretion in the absence of mala fides.

APPEAL from the judgment of Huddleston, B. at the trial.

The action was for unlawfully and maliciously causing the plaintiff's name to be removed from the register kept under the Dentists Act, 1878. By consent of the parties the jury were discharged, and the case was tried by the learned judge without a jury. The facts were as follows: The plaintiff was a dentist who had obtained a diploma as a licentiate in dental surgery from the Royal College of Surgeons in Ireland, and his name had been entered in respect of that qualification in the dentists register kept in accordance with the provisions of the Dentists Act, 1878.

An applicant for a diploma from the Royal College of Surgeons in Ireland is required to declare that, if the diploma is granted, he will not seek to attract business by advertising, or by any practice considered by the college to be unbecoming, and that he agrees that the diploma shall be cancelled on its being proved to the satisfaction of the president and council of such college that he has done so. The plaintiff had made such a declaration on applying for his diploma. In July, 1885, the plaintiff's diploma was withdrawn by the Royal College of Surgeons in Ireland, on the ground of his having advertised in connection with his profession. The Royal College of Surgeons in Ireland gave notice to the general council to the effect that they had withdrawn the plaintiff's diploma. Thereupon the executive committee of the council directed the registrar to make application to the Royal College of Surgeons in Ireland for information as to the cause of the withdrawal of the diploma, which the registrar accordingly did. The Royal College of Surgeons in Ireland returned an answer stating that the diploma had been withdrawn because the plaintiff had in violation of his undertaking resorted to advertising. The general council referred the matter to the dental committee of the council for inquiry and report. That committee reported the communication received from the Royal College of Surgeons in Ireland as to the cause of the withdrawal of the diploma. The general council thereupon passed a resolution to the following effect: 1. That the qualification of licentiate in dental surgery of the Royal College of Surgeons in Ireland appended to the name of the plaintiff should be erased from the dentists register. 2. That the name of the plaintiff should be also erased from the dentists register; and the registrar was directed to erase the name and qualification accordingly. This resolution was passed without communicating with the plaintiff or calling upon him for any explanation. The name of the plaintiff was, in accordance with such directions, erased. In answer to a letter from the plaintiff claiming that his name should be restored, the defendants' solicitor wrote to the effect that, the only qualification in respect of which the plaintiff's name was on the register having been withdrawn by the licensing body, and due notice thereof having been given to the registrar,

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the general council, in order to keep the dentists register correct, had no alternative but to order the removal of the plaintiff's name from the register. The plaintiff then applied for and obtained a mandamus to the general council, directing them to restore his name to the register, on the ground that the fact of the withdrawal of his diploma by the Royal College of Surgeons in Ireland was no reason for erasing his name from the register. The case is reported 19 Q. B. D. 467. The plaintiff then brought the present action in respect of the period during which his name was so removed from the register. The learned judge at the trial held that the functions exercised by the defendants in erasing the name of the plaintiff from the register being discretionary and quasi-judicial, and there being no evidence of malice, the action was not maintainable; and therefore he gave judgment for the defendants. (1)

(1) The Dentists Act, 1878, s. 11 provides that (1) a register shall be kept by the general registrar to be styled the dentists register; and that register shall (a) contain in one alphabetical list all United Kingdom dentists, that is to say, all persons who are registered under this Act as having been at the passing thereof engaged in the practice of dentistry or dental surgery, and all persons who are registered as licentiates in dentistry or dental surgery of any of the medical authorities of the United Kingdom . . . . (2.) The dentists register shall contain the said lists made out alphabetically according to the surnames and shall state the full names and addresses of the registered persons, the description and date of the qualifications in respect of which they are registered, and, subject to the provisions of this Act, shall contain such particulars and be in such form as the general council shall from time to time direct. (3.) The general council shall cause a correct copy of the dentists register to be from time to time and at least once a year printed under their direction, and published, and sold, which copy shall be admissible in evidence. (5.) . . . . Every registrar shall in all respects in the execution of his discretion and duty in relation to any register under this Act, conform to any orders made by the general council under this Act, and to any special directions given by the general council. Sect. 13 provides in substance, that the general council shall cause to be erased from the dentists register any entry which has been incorrectly or fraudulently made; that, where a person has been convicted either in Her Majesty's dominions or elsewhere of an offence, which, if committed in England, would be a felony or misdemeanour, or been guilty of any infamous or disgraceful conduct in a professional respect, he shall be liable to have his name erased from the register, and that the general council may cause inquiry to be made into the case of a person alleged to be liable to have his name erased under the section and, on proof of such conviction or of such infamous or disgraceful conduct, shall cause the name of such

*Waddy, Q.C.*, and *Lyon*, for the plaintiff. Malice was not necessary to the maintenance of the action. The defendants unlawfully and wrongfully removed the plaintiff's name from the dentists register upon which he was entitled to be: and, the duty which they were performing with regard to the register being merely ministerial, they are subject to an action for breach of that duty, without malice. They were clearly not acting under the powers given by s. 13 of the Dentists Act, 1878, with regard to the erasure of a person's name for disgraceful conduct in a professional respect. They never affected to exercise any judicial function. It is clear from their own statement that they erased the plaintiff's name under the erroneous impression that, his qualification in Ireland being withdrawn, he was no longer entitled to be on the register, and therefore they gave directions under s. 11 to the registrar to erase his name. The functions of the general council with regard to the register under the Act, other than their functions under s. 13, are merely ministerial. The duty is imposed on them of having the register kept correctly, as required by the Act. The plaintiff being entitled to be on the register, they were bound to keep his name on it. The case, therefore, simply resolves itself into this: they did what was unlawful without justification, and thereby caused injury to the plaintiff. It is a general rule that for breach of a merely ministerial duty imposed by a statute, by which a person is injured, an action will lie without malice: *Pickering* v. *James*. (1)

They also cited *Ashby* v. *White* (2); *Cullen* v. *Morris* (3); *Tozer* v. *Child*. (4)

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person to be erased from the register, &c. Sect. 15 provides that the general council shall, for the purpose of exercising in any case the power of erasing from and of restoring to the dentists register the name of a person or an entry, ascertain the facts of such case by a committee of their own body, not exceeding five in number, of whom the quorum shall be not less than three, and a report of the committee shall be conclusive as to the facts, for the purpose of the exercise of the said powers by the general council, and that the general council shall from time to time appoint, and shall always maintain a committee for the purposes of this section, &c.

(1) Law Rep. 8 C. P. 489.
(2) 1 Ld. Raymd. 938.
(3) 2 Starkie, 587.
(4) 7 E. & B. 377.

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*R. T. Reid, Q.C.*, and *Muir McKenzie*, for the defendants. The defendants must be taken to have acted under s. 13. They have power to erase the names of persons from the register under that section, and that is clearly not a ministerial but a judicial function. The truth seems to be that the defendants thought that, the Irish medical authorities having withdrawn the plaintiff's diploma for breach of his undertaking not to advertise, i.e. for misconduct in a professional respect, they were bound to act on the fact of the qualification being so withdrawn and erase his name. The question whether the grounds they so acted on were good, or whether they adopted the right procedure, is immaterial for the present purpose. If the defendants had power to erase a name from the register under the Act, and they acted bonâ fide, intending to act under the Act, they are not subject to an action because they acted on wrong grounds or because they proceeded under the wrong section or erroneously in other respects. If it be once ascertained that there is such a power, and that the erasure of a name is a judicial matter under the Act, then whether the grounds on which the power is exercised are good or bad, whether the mode in which it is exercised is right or wrong, in the absence of malice, no action lies for the erasure. Assuming that the defendants must be taken to have intended to act under s. 11, sub-s. (5), only, which gives them power to give special directions to the registrar, and not under s. 13 at all, it is impossible to say that the functions of the general council under that sub-section are ministerial only.

[LORD ESHER, M.R. It seems to me doubtful whether the special directions in s. 11 have to do with the erasure of names.]

Their construction of the section may have been wrong, but they would nevertheless be acting under a section which imposes on them discretionary duties, and could not in the absence of malice be liable to any action for such error.

It is probable that the council, having before them the fact of the withdrawal of the plaintiff's diploma and the grounds of such withdrawal, without reasoning very specifically on the question under what section they were acting, ordered the name to be erased, intending to act under a power of erasure given by the Act. If a power to erase existed under the Act, and was a

judicial power, no action will lie without malice, no matter how erroneous the grounds may be on which they acted.

*Waddy, Q.C.*, in reply.

LORD ESHER, M.R. In this case an action is brought against the defendants for unlawfully and maliciously removing the name of the plaintiff from the dentists register. I think that the learned judge who tried the case must be taken to have found that the defendants acted without malice. It is perfectly clear to my mind that his finding is right, and that in doing what they did they were not acting maliciously, but endeavouring to do their duty to the public and their profession. But, nevertheless, it is clear that, in doing what they did on this occasion, they did not take the course which they ought to have taken. They struck off the plaintiff's name without communicating with him or giving him an opportunity of being heard. When the case came before us on the previous occasion, the question then being whether he was wrongly struck off the register, we said they had not taken the proper steps, and they must put his name on the register again, without prejudice to the question whether on subsequent inquiry there might appear to be proper grounds for striking him off under s. 13 of the Act. But the question, upon an application for a mandamus to have his name reinserted on the register, whether they acted rightly in striking him off, in the sense that they took the proper steps, is quite a different question from the question whether an action will lie against them in the absence of malice for wrongfully removing his name. The question now is whether such an action will lie? I think the defendants were intending, in what they did, to do what they were entitled to do, viz., to perform the public duties imposed upon them by the Act for the protection of the public and also of the profession. There are two sections, apparently, which are material to this question, the 11th and the 13th. It seems to me that the 13th was the section under which they ought to have acted, if there was any question of erasing the name of a person from the register for having acted disgracefully in a professional respect. But I think that in any case they bonâ fide intended to act under the Act of Parliament which

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gives them powers as to the register. That being so, the question is whether they were acting merely ministerially; whether they were intending to act under s. 11 only, or under s. 13 as well, if they were not so acting, it appears to me that in the absence of malice they are protected from an action. If they were acting under s. 13, I think the functions they were so exercising were clearly judicial, and not merely ministerial, and that they would, therefore, not be liable to an action for the erroneous exercise of those functions without malice. If they were intending to do what they were authorized to do under s. 13, but were advised to proceed under the wrong section, I think they would not be liable to an action for acting erroneously under a wrong section of the Act, as they intended to act under the Act and what they did was not merely ministerial. But, assuming that they were not intending to exercise the functions given by s. 13 at all, but were proceeding solely under s. 11, without regard to those functions, what is it they have to do under that section? The power given to them is a power to give a special direction to the registrar. They have, then, given a special direction to the registrar to erase the plaintiff's name. Is giving a special direction to the registrar under that section merely a ministerial act, to be done without the exercise of any discretion at all? I do not think so. I think it is clearly discretionary. Now it appears to me that it is a true proposition to say that, when a public duty is imposed by Act of Parliament upon a body of persons, which duty consists in the exercise of a discretion, it cannot be said that the exercise of that discretion is a merely ministerial act. If what the defendants did cannot be considered to have been merely ministerial, then I think for the purposes of the question, whether they are protected from an action, it must be considered as judicial. It appears to me that a body such as the defendants can only be made subject to an action for things which they have done erroneously without malice in carrying out their duties under the Act, if it can be shewn that they were acting merely ministerially. It is not necessary to go through the cases that have been cited on the subject. They seem to me all to shew that such an action as this cannot be maintained except where the duty intended to be exercised is

only ministerial. For these reasons it appears to me that this action is not maintainable, and that the judgment of Huddleston, B., was correct.

FRY, L.J. The learned judge in this case has found that there was no malice on the part of the defendants; and the correctness of that finding appears to me obvious. The defendants proceeded in the matter with care and deliberation, and were anxious to ascertain all the facts of the case, and, though they made an error, they appear to have acted with perfect good faith. That being so, the inquiry arises whether the action will lie without malice. That question again depends on the inquiry whether, in what they did, the council were performing a merely ministerial duty. I agree that, where a body like the defendants have imposed upon them a public duty, which consists in the exercise of a discretion, they are not liable to an action merely for an erroneous exercise of the discretion so vested in them. I think that the general scheme of this Act is that the registrar is to be the person by whom all merely ministerial acts with regard to the keeping of the register are to be performed. By the 11th section a register is to be kept by the general registrar to be styled the "Dentists Register"; and by the 12th section the general registrar is from time to time to insert in the register certain alterations which may come to his knowledge. I do not think that even the registrar's functions are entirely confined to merely ministerial acts, because he has to exercise certain discretions, one of which, for instance, is as to the evidence on which he will act. When we consider the position in which the general council are placed, we find that they are to superintend the registrar. In the first place, they are to direct what particulars the registor is to contain, and in what form it is to be kept. They are, therefore, obviously clothed with a discretion to consider what in those respects the interests of the public and the profession require. It is further provided by s. 11, sub-s. (5), that any registrar "shall in all respects in the execution of his discretion and duty in relation to any register under this Act conform to any orders made by the general council under this Act, and to any special directions given by the general council." Those words appear to

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me to include orders made by the general council under s. 13 in the exercise of their judicial discretion. With regard to the provision as to special directions, having already given general directions as to the keeping of the register, I do not see how they can give special directions unless in the exercise of a discretion, and upon consideration of the circumstances of the particular case with reference to which they give such directions. The conclusion I arrive at upon the facts is that the council, desiring, as I have said, to do their duty under the Act in this case, thought that the register must in such a case automatically follow the qualification in Ireland, and, when that was withdrawn, the register must be corrected accordingly; and that, that being so, they had power to order such correction by giving a special direction under s. 11. In that view they were wrong; but they were, as it seems to me, in making that error exercising a discretion. They were doing what they thought right in the exercise of the discretionary power given them over the register by the statute. As I gather from the statute, there is no duty imposed upon the council with regard to the register, which is not more or less a discretionary duty. Therefore, I think that the council were not in this case performing a purely ministerial function; they acted in the exercise of a discretion, though they acted in the exercise of it erroneously; and, therefore, they are not liable to an action. For these reasons, I think the appeal should be dismissed.

LOPES, L.J. I am of the same opinion. It must be taken, I think, that the defendants acted bonâ fide and without malice, but that they improperly erased the name of the plaintiff from the register. They acted honestly, but they made a mistake in their mode of proceeding. They thought, as it appears to me, that, without calling on the plaintiff for an explanation, they were justified in erasing his name from the register, because the qualification in Ireland had been withdrawn which originally entitled him to be placed on the register. The question is whether an action can, under those circumstances, be maintained against them for what they did. It is not disputed that the defendants were performing a public duty; and that they in-

tended to act under the statute. The point contested was whether they were in fact acting judicially or merely ministerially in what they did. If they were acting under s. 13, it cannot be disputed that they were acting judicially. But it is said that they were acting under s. 11 alone; and that acting under that section they were acting only ministerially. I will not refer to s. 11 at length. The effect of the section is that the council have power to give special directions to the registrar to which he is bound to conform. That being so, they have, in my opinion, a discretion as to the directions they should give, and, therefore, in giving such directions they are acting judicially. The result is, as it seems to me, that whether they were acting under s. 13 or s. 11 only, they were acting judicially, and, as they were so acting and they acted without malice, according to the cases the action is not maintainable.

*Appeal dismissed.*

Solicitors for plaintiff: *Calkin, Lewis, & Stokes.*
Solicitors for defendants: *Warren, Gardner, & Murton.*

E. L.

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## KENRICK & CO. *v.* LAWRENCE & CO.

*April* 21, 24

*Copyright—Works of Art—What Drawings may be the subject of Copyright—Absence of Artistic Merit—Registration—Author—Copyright (Works of Art) Act,* 1862 (25 & 26 *Vict. c.* 68).

The plaintiffs were a firm of printers. J., a member of the firm, conceived the idea of printing and publishing cards bearing a representation of a hand holding a pencil in the act of completing a cross within a square, with a view to such cards being used at parliamentary and other elections for the guidance and instruction of illiterate voters in the marking of their ballot papers. J., being unable to draw, employed an artist in the service of the firm to make, under his directions, a drawing of the representation above described. The plaintiffs registered the drawing under the Copyright (Works of Art) Act, 1862, and in the memorandum stated J. to be the author of the drawing. Subsequently the defendants published similar cards with a hand holding a pencil in the act of completing a cross in a particular square of a voting paper. The hand on the defendants' cards was in a slightly different position, but the idea was taken from the plaintiffs' cards. Neither the plaintiffs' nor the defendants' drawings were of any artistic merit:—

*Held*, that an action for infringement of copyright could not be main-

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tained, on the grounds: 1. That the plaintiffs' drawing was so far not the subject of copyright that it was not entitled to protection against an imitation which was not an exact reproduction; 2. That J. was not the author of the drawing, and that the registration was consequently void.

THIS was an action for infringement of copyright in a drawing under the Copyright (Works of Art) Act, 1862 (25 & 26 Vict. c. 68). The case came on for trial before Wills, J., and a common jury, when the jury were discharged, and the damages agreed at forty shillings in the event of the judge deciding in the plaintiffs' favour. The facts sufficiently appear from the judgment.

*Aston, Q.C.*, and *Macrory, Q.C.*, for the plaintiffs.
*Bosanquet, Q.C.*, and *Pritchett*, for the defendants.

1890. April 24. WILLS, J. The plaintiffs in this case are A. J. Kenrick and F. T. Jefferson, trading in partnership at West Bromwich as the Free Press Company. They are printers and publishers. During the pendency of the partnership it occurred to Mr. Jefferson that it was very difficult without a picture to convey to a voter who cannot read, in respect to parliamentary and other elections at which voting is effected by means of a cross put in a certain place on a piece of paper, how he is to vote; and it occurred to him that a card or paper on which there should be a picture of a hand holding a pencil and in the act of completing a cross within the proper square upon the paper would be likely to sell. He is unable to draw himself, but he drew upon a piece of paper the proper lines dividing a representation of the ballot paper into the proper spaces, and told a Mr. Bott, an artist in the employment of himself and his partner, to draw a hand carrying a pencil and in the act of finishing a cross enclosed in a square. The artist made him a sketch, which he directed the artist to alter as to the position of the hand, and this drawing so arrived at Mr. Jefferson registered under 25 & 26 Vict. c. 68, as a drawing of which he, Mr. Jefferson, was the author, and of which his firm were the proprietors.

The defendant has published a similar card, with a hand in a slightly different position, also holding a pencil in the act of finishing a cross upon the proper spot in a voting paper, and I

have no doubt that he took the suggestion from the plaintiffs' card. The plaintiffs complain of this as an infringement of their copyright under the Act. It was in evidence that more than a million copies of the card of the plaintiffs have been sold since the year 1885, and that they have been used at nearly every election in the kingdom. It was urged, probably with truth, that such a card was practically the only mode of instructing the illiterate voter how to record his vote, and it is obvious that if the privilege of instructing the illiterate voter how to vote by the only vehicle by which the act of voting can be represented to the eye, and the instructions how to vote and whom to vote for can be brought home to him, be vested in the plaintiffs for seven years beyond the termination of a life which may very well subsist for half a century longer—for Mr. Jefferson is now only thirty-six years of age—and be their monopoly, it is difficult to put an adequate value upon their property in such a right. If that period should shortly arrive, which to many politicians appears to be a kind of constitutional millennium, when all the remaining ignorance, male and female, of the three kingdoms shall be swept into the electoral fold, the amount of political power which may become vested in the plaintiffs or their assignees will be greater than it is possible to estimate, and the destinies of the country may be placed in the hands of the fortunate owner of the talisman. A prospect is open which may be described in well-known language as a "potentiality of wealth beyond the dreams of avarice," and legislation might even be necessary to prevent so potent an engine of political power from becoming vested in an infant or a madman, an official receiver, or a trustee in bankruptcy, or from being bought or sold at auction, or remaining permanently the heritage of any one political party. The importance of the question raised in this particular instance cannot, therefore, be put too high, and justifies the elaborateness and seriousness with which the case was opened by Mr. Aston, and which, until I came to reflect upon the constitutional aspect of the case, I confess I thought a little exaggerated.

The first question which arises is, what is and what is not the nature of the right conferred under the Act upon the

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author by the registration of the drawing of which he is the author. It is perhaps easier to say what it is not than to give a satisfactory definition of what it is, and I think that I am upon very safe ground in saying that the mere choice of subject can rarely, if ever, confer upon the author of the drawing an exclusive right to represent the subject, and certainly where the subject chosen is merely the representation to the eye of a simple operation which must be performed by every person who records a vote there cannot possibly be an exclusive right to represent in a picture that operation. It may well be that something special in the way of artistic treatment even of this simple operation, if it existed, might be the subject of copyright; but nothing of the kind has been suggested or exists in the present case, and if it does exist without being discovered it has not been imitated, for there is nothing which by any flight of imagination can be called artistic about either the plaintiffs' or the defendants' representation of a hand making the mark of a cross. It may be also that even the coarsest, or the most commonplace, or the most mechanical representation of the commonest object is so far protected on registration that an exact reproduction of it, such as photography for instance would produce, would be an infringement of copyright. But in such a case it must surely be nothing short of an exact literal reproduction of the drawing registered that can constitute the infringement, for there seems to me to be in such a case nothing else that is not the common property of all the world. It is possible that in this case the proprietors of the drawing registered may have a right to be protected from a reproduction of their picture of a hand drawing a cross in which every line, dot, measurement, and blank space shall be rendered exactly as in the original, or in which the variations from such minute agreement shall be microscopic. But I cannot see how they can possibly make a higher claim, or say that because they have registered a drawing of a hand pencilling a cross within a square that no other person in the United Kingdom is at liberty to draw a hand pencilling a cross within a square for perhaps the next half century. The plaintiff, Mr. Jefferson, put his case as high as that proposition, for he said he might wish to claim applications of the picture to subjects other

than the voting cards. It is obvious that unless there be a copyright in the *subject*, any other person who wishes to draw a hand pencilling a cross within a square cannot help producing something so like the plaintiffs' design as to look very like a colourable imitation of it. Now, it may or may not be very shabby conduct on the part of the defendant to wish to represent a hand pencilling a cross within a square, notwithstanding that the plaintiffs were first in the field, and notwithstanding that but for the picture used by the plaintiffs they might never have thought of making theirs; but I cannot see why they should be precluded, for the next fifty years perhaps, from representing in a picture the act which every voter performs when he records his vote simply because one of the plaintiffs first thought of doing so—any more than if a new article of commerce were introduced of extensive distribution and very simple and definite shape and proportions, and a drawing of it were made for one firm, all other persons should be precluded from making a drawing which, if it truthfully represented the same thing, must be exceedingly like the first drawing, nor, even though the draftsman of the second drawing might never have seen the original article, or might have derived his knowledge of its existence and aspect solely from the first drawing. If a new and very simple tea-caddy were represented first by A. in a drawing which he registered, I cannot conceive that he could during his whole life prevent B. from drawing the same tea-caddy, and even from drawing it from his recollection of A.'s picture, nor that A. could claim copyright, except in the extremely limited and useless sense in which I have suggested that possibly a copyright might exist for a registered drawing of even such a subject. In the present instance, what the plaintiffs claim is really a right to prevent any one else from drawing the same subject as that of his drawing. If he has a copyright in the *subject* there is a colourable imitation, because the subject is not altered by changing the position of the hand and adding the indications of a shirt sleeve. But it is clear that there is no copyright in the subject. As for the manner of treating the subject, there can be no copyright in that, for if the thing to be represented be represented at all, it is impossible to treat it in any other way. It seems to me, therefore, that

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although every drawing of whatever kind may be entitled to registration, the degree and kind of protection given must vary greatly with the character of the drawing, and that with such a drawing as we are dealing with the copyright must be confined to that which is special to the individual drawing over and above the idea—in other words, the copyright is of the extremely limited character which I have endeavoured to describe. A square *can* only be drawn as a square, a cross *can* only be drawn as a cross, and for such purposes as the plaintiffs' drawing was intended to fulfil there are scarcely more ways than one of drawing a pencil or the hand that holds it. If the particular arrangement of square, cross, hand, or pencil be relied upon it is nothing more than a claim of copyright for the *subject*, which in my opinion cannot possibly be supported.

I have endeavoured to discuss this part of the subject without putting any limitation upon the kind or nature of the drawing for which copyright may be claimed. But it is clear that in the opinion of Bowen, L.J., in *Nottage* v. *Jackson* (1), the statute relates only to works of art of some sort or other. He says: "Parliament treats photography as a fine art. It puts it on a level for the purposes of registration with paintings and drawings" (at page 636). It would be absurd to speak of such drawings as those in the present case as works of art. Possibly it would be a more correct view of his Lordship's judgment to say that he considered that it was the product of the artistic faculty that was intended to be primarily, at all events, the subject of copyright—the thing to be protected by the Act. The difference, after all, is one rather of words than of practical effect. The title of the statute is, "An Act for amending the law relating to copyright in works of fine arts and for repressing the commission of fraud in the production and sale of such works." The title of a statute does not go for much in construing it; but I do not know that it is to be absolutely disregarded. The cases on the subject are collected and their effect stated in Master Wilberforce's very careful and able treatise on Statute Law, at pages 272–276. The title of Lord Campbell's Act was certainly referred to as not without significance in a considered judgment of the Court of

(1) 11 Q. B. D. 627.

Queen's Bench in *Blake* v. *Midland Ry. Co.* (1) As far as it goes, the title would certainly seem to point to the notion that it is the product of the artistic faculty, which is the primary thing to be protected. And although it might not be right on that account to cut down the generality of the expression "every drawing," yet it may serve to point to the character of the protection intended. The phrase "artistic faculty" which I have used is vague enough; but here, again, it is easier to say what is not the product of any artistic faculty than to define what is so; and here it is easy to pronounce that no such faculty has been exercised. No kind of value is given to the article produced by reason of its being a pleasing, a particularly accurate, or a tasteful representation upon paper of the object represented, or by reason of that object itself or the method of treating it appealing in any way to imagination, affection, memory, or association. It has less even of such properties than the geometrical figures which illustrate a proposition of Euclid, and the kind of moral claim, if I may so speak, which such a drawing has to protection is far more of the nature which attaches to a trade design than to that which belongs to a work of art—a production which has merit or value *as* and in its character of a drawing, a painting, or a photograph, and not simply because it conveys by way of a picture a description or direction which could be just as well put into words, if words were not to many people a sealed book.

Without going further, therefore, my judgment would be for the defendant. Other objections, however, have been raised to the right of the plaintiffs to recover, even supposing that the design in question comes within the purview of the statute. First it is said that the plaintiffs can be the proprietors only by assignment from the author—and by s. 3 of the Act the assignment is to be in writing—and that, whoever be the author, there is no such assignment. I think, however, this objection is not valid. By s. 1, if the drawing is executed for pay or valuable consideration for a particular person, the copyright is to belong to that person, and here the drawing was executed by Mr. Bott for the plaintiffs for money paid by them to him. And, there-

(1) 18 Q. B. 93, 109.

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fore, the copyright belongs to them, and they are properly registered as proprietors.

But then it was said the registration in this case did not satisfy the Act, inasmuch as the Act requires the name or place of abode of the proprietor to be stated; and the actual registration is that of the firm or style under which the plaintiffs carry on business. This question, however, seems to me to have been decided in favour of the registration of the firm name by the case of *Rock* v. *Lazarus*. (1) It would do a great deal of mischief to unsettle the law upon this point, when no doubt a great deal of valuable property is protected only by registration effected in a similar manner on the faith of that decision.

There, remains, however, a more serious objection to the registration. Mr. Jefferson is registered as the author of the drawing. It seems to me he was not the author. The expression is, no doubt, an unhappy one. But I do not see how a gentleman who is incapable of drawing even such a very simple picture as a rough sketch of the human hand, and who did not, in fact, set pencil to paper in the matter, can be called the author of the drawing. He suggested the subject, and made such limited suggestions as to the treatment as the subject admitted of; but it seems to me that in an Act which gives copyright to drawings the author must mean a person who has at least some substantial share in putting the touches on to paper. Such was very clearly the view of every member of the Court of Appeal in *Nottage* v. *Jackson* (2), and although that case might perhaps have been decided without saying what is meant by the author of a drawing or painting, and so, perhaps, in a very strict sense, the observation was extra-judicial, still it was very nearly necessary to the determination of that case, and I should follow it even if I differed from it. But as it entirely expresses my own view, I can act upon my own view with the less hesitation. It may possibly be that Mr. Jefferson and Mr. Bott were joint "authors" of the drawing; but I cannot understand how the man who did all that was done in the way of drawing can be excluded from all participation in the authorship of the thing drawn by him.

(1) Law Rep. 15 Eq. 104. (2) 11 Q. B. D. 627.

In my opinion, therefore, the defendants are entitled to judgment with costs.

*Judgment for the defendants.*

Solicitor for plaintiffs: *Frith Needham, for E. Caddick, West Bromwich.*

Solicitors for defendants: *Charles Robinson & Co., for J. W. Phillips, Birmingham.*

J. F. C.

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MAW *v.* JONES.

*May* 16.

*Damages—Measure of—Contract—Wrongful Dismissal of Apprentice—False Charge of Misconduct.*

By a deed of apprenticeship the plaintiff bound himself as apprentice to the defendants to learn the business of a draper for the term of four years from May, 1887, and the defendants covenanted to instruct the plaintiff and provide him with food and lodging during that term. It was provided by the deed that, if during the term the plaintiff shewed want of interest in his work it should be lawful for the defendants to cancel the deed upon giving him a week's notice. In October, 1888, the defendants summarily and without any notice dismissed the plaintiff, assigning as the reason of his dismissal that he had been guilty of frequent acts of insubordination, and had gone out at night without permission.

The plaintiff having brought an action for wrongful dismissal in breach of the apprenticeship deed, the jury found that he had not been guilty of the misconduct imputed, and that no grounds existed justifying the defendants in dismissing him without notice, but that grounds did exist which would have justified them in dismissing him with a week's notice. On the question of the measure of the damages to which the plaintiff was entitled under those circumstances, the judge directed the jury that, although they might take into consideration as an element in the case the fact that the defendants would have been justified in dismissing the plaintiff with a week's notice, they were not bound to limit the damages to the value of the week's notice which he had lost:—

*Held*, that this was no misdirection.

MOTION for a new trial on the ground of misdirection.

This was an action by an apprentice for wrongful dismissal. The defendants pleaded a justification of the dismissal, at the same time paying forty shillings into Court. The action was tried before Manisty, J., and a jury. The facts of the case and the nature of the direction are sufficiently stated in the headnote. The jury returned a verdict for the plaintiff with 21*l.*

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damages. There was no finding as to the value of a week's notice; but it was agreed between the parties that it would not have exceeded the amount paid into Court.

*Channell, Q.C.* (*Wedderburn*, with him), for the defendants. The value of a week's notice was the sole measure of the damages. The defendants having been entitled to dismiss the plaintiff at a week's notice, the loss of that notice was the only damage that he sustained. In the case of an ordinary domestic servant who is improperly dismissed without notice, the measure of damages is a month's wages and nothing more: *Hartley* v. *Harman*. (1)

[MATHEW, J. Have you ever heard that principle applied to a case where a false charge of misconduct has been made?

LORD COLERIDGE, C.J. The plaintiff, by reason of his being dismissed during his apprenticeship with a slur on his character, naturally would experience a greater difficulty in getting employment elsewhere.]

Damages for defamation cannot be recovered except in an action for defamation. As a general rule damages for matter of aggravation cannot be given in an action of contract. The only exception to that rule is the anomalous action for breach of promise of marriage.

*McCall* (*J. F. K. Cleave*, with him), for the plaintiff, was not called upon.

LORD COLERIDGE, C.J. I am of opinion that there was no misdirection in this case. It has been contended that, the deed having provided that the defendants might dismiss the plaintiff at a week's notice if he shewed want of interest in his work, and the jury having found that he did shew such want of interest, the damages to which he is entitled for wrongful dismissal are ascertained at the value of the week's notice which the defendants omitted to give. If the defendants had dismissed the plaintiff on the ground of such want of interest, intending to act under the clause which empowered them to dismiss him on that ground, the dismissal, apart from the want of notice, would not have been wrongful, and in such case the defendants' contention

(1) 11 Ad. & E. 798; per Coleridge, J., p. 802.

that the measure of the damages was the value of the week's notice would have been good. But the defendants did not dismiss him on that ground. In this indenture the law implies a condition that the master shall not dismiss the apprentice wrongfully, and here the defendants have done so. Then what is the measure of the damages for the breach of that condition? The plaintiff was entitled to recover for all the damage flowing naturally from the breach, and in considering what that would include the jury might take into account the difficulty that the plaintiff as a discharged apprentice would have in obtaining employment elsewhere. The judge told the jury that, as the defendants had not acted under the notice clause, fair damages for the wrongful dismissal must be given; but at the same time he told them that they might take into consideration the fact that the defendants would have been justified in dismissing the plaintiff under the notice clause. In the opinion of the jury, after taking into account that the boy was not an industrious boy, the fair damages were £21. In my judgment the direction was perfectly right and the verdict sensible.

MATHEW, J. I am of the same opinion. I have nothing to add.

*Motion dismissed.*

Solicitor for plaintiff: *W. Rawlins.*

Solicitors for defendants: *Pearce, Jones & Co.*

J. F. C.

1890
*March 5.*

[IN THE COURT OF APPEAL.]

PARSONS *v.* BRAND. COULSON *v.* DICKSON.

*Bill of Sale—Attesting Witness—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

Under the Bills of Sale Act (1878) Amendment Act, 1882, a bill of sale given by way of security is void unless both the address and description of the attesting witness appear in the attestation clause, and the defect is not cured by the fact that such address and description appear in the affidavit filed on registering the bill of sale.

In the first of these cases the attesting witness to a bill of sale dated October 22, 1889, simply signed his name without adding either his address or description. The affidavit filed on registration of the bill of sale stated both his address and description. An execution creditor disputed the validity of the bill of sale, and Fry, L.J., and Mathew, J., affirming a decision of a county court judge, held it to be invalid on the ground of the omission of the address and description. The holder of the bill of sale appealed.

In the second case the attesting witness signed his name and gave his address, but did not state his occupation. In this case also the affidavit gave the address and description. Mathew, J., held that the bill of sale was invalid, and the holder of the bill of sale appealed. The two appeals were heard together.

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*A. E. Nelson*, for the appellant. It was held in the Court below that this bill of sale was void under the Bills of Sale Act, 1882, s. 9, because it was not in accordance with the form in the schedule to the Act. But the address and occupation are no part of the form in the schedule. The Bills of Sale Act, 1878, s. 10, sub-s. 2, requires the name and address of the attesting witness to be given in the affidavit, and this has been done, so that no mistake can arise from the omission, since whoever goes to the registry to inspect the bill of sale must see the affidavit. The Act of 1882 requires the bill of sale to be "duly attested," and this requirement has been complied with, for a deed is duly attested if attested by a witness. Under the

Act of 1854 (17 & 18 Vict. c. 36), an error in the affidavit as to the attesting witness was held to be cured by the entry of his address and occupation in the bill of sale, which is going further than supplying a defect in the attestation clause by the affidavit: *Jones* v. *Harris* (1); *Routh* v. *Roublot.* (2) In *Blount* v. *Harris* (3) a misdescription which could not mislead was held immaterial. *Ex parte Stanford* (4) shews that a deviation from the form which does not alter the effect of the instrument is immaterial. The object of the Act is to give full information as to the attesting witness, and if it is given by the affidavit no mistake can arise from an omission in the attestation. The Court below felt bound by *Blankenstein* v. *Robertson* (5); but that case is not binding on the Court of Appeal.

*H. A. Forman,* for the execution creditor. The directions contained in the form of bill of sale in the schedule to the Act of 1882 must be treated as statutory enactments. The Act provides that the bill of sale must be "duly" attested, which means attested in manner required by the Act, and, if the directions in the form are not complied with the bill of sale is not duly attested. The form has the words "add witness's name, address, and description," and the omission to comply with these directions is fatal. In *Ex parte Stanford* (4) it appeared to have been held that a variation of form which produces no difference of effect is immaterial; but in *Thomas* v. *Kelly* (6) Lord Macnaghten does not accept that view. Suppose the date of the bill of sale was omitted, there is no express direction in the Act that it shall be inserted; but it is a characteristic part of the deed, and surely the omission would be fatal, though it would not invalidate an ordinary deed. The having no attesting witness would not make an ordinary deed invalid; but it cannot be contended that it would not avoid a bill of sale. In *Thomas* v. *Kelly* (6) Lord FitzGerald evidently did not consider the test proposed in *Ex parte Stanford* (4), as being applicable to all cases, and in *Ex parte Stanford* (4) itself there are observations as to the necessity of complying with statutory requirements. *Blount* v. *Harris* (3)

(1) Law Rep. 7 Q. B. 157.
(2) 28 L. J. (Q.B.) 240.
(3) 4 Q. B. D. 603.
(4) 17 Q. B. D. 259.
(5) 24 Q. B. D. 543.
(6) 13 App. Cas. 506.

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really does not bear on the case, for the address there was impossible, but not misleading. It is said that the address and occupation can be found at the Bills of Sale Office, and that therefore their omission in the attestation is immaterial; but the object of the Act is to make the bill of sale complete in itself. A person may see the original miles away from the office, and he ought to have materials before him to let him know all about the attesting witness.

*Nelson*, in reply.

COULSON *v.* DICKSON.

*Channell, Q.C.*, and *A. J. Allen*, for the appellant. The direction to insert the address and description is not part of the "form" within the meaning of s. 9 of the Act of 1882. It relates to the mode of execution, not to the form. What is meant is, that the terms of the contract must be according to the form; the direction as to the attesting witness is something apart from the form. It must not be forgotten that there is a separate enactment—s. 8—as to attestation of bills of sale. The word "duly" cannot be construed so as to incorporate the directions in the form. The words "add witness's name, address, and description" are merely directory, and it is only with respect to the terms of the contract that it is necessary to adhere strictly to the form.

*Lane, Q.C.*, for the respondent. The object of the legislature was to oblige the parties to insert in the bill of sale itself all particulars which the legislature considered desirable as bearing on the question whether the document was a bonâ fide instrument. This is not merely a technical point; its importance is shewn by the express enactment that the address and description of the witness shall be given in the affidavit. The judgment of Bowen, L.J., in *Ex parte Stanford* (1), has been referred to; but that case is no authority for holding that the substance of the contract only is to be looked to, and the test proposed by Bowen, L.J., is, as was said in *Thomas* v. *Kelly* (2), exclusive, not inclusive. The Lord Justice was dealing with a particular state of facts, and his language must be construed with regard to it.

(1) 17 Q. B. D. 259. (2) 13 App. Cas. 506.

*Channell, Q.C.*, in reply. The fact that attestation is expressly provided for by s. 8, shews that s. 9 must refer to something else.

[LINDLEY, L.J. Sect. 8 refers to all bills of sale; s. 9 only to those given by way of security.]

COTTON, L.J. These are appeals from decisions that the bills of sale to which they related were void, on the ground that in one case the attesting witness only signed his name without giving either his address or description, and in the other gave his name and address without any description.

The question is, whether s. 9 of the Act of 1882 makes these bills of sale void. With the policy of the Act we have nothing to do, we have only to carry out the intention of the legislature as appearing in the terms of the Act. In the body of the Act there is no express direction that the address and description of the attesting witness to a bill of sale shall appear upon the bill of sale; but it provides that the bill of sale shall be void if not made in accordance with the form in the schedule to the Act. Now the form in the schedule contains an attestation clause and has a direction, "add witness's name, address, and description." The question then is, whether we can say that a bill of sale on which the address and description of the attesting witness do not appear is in accordance with the form. It has been argued that the address and description are not part of the form on two grounds: first, it is said that the "form" only refers to what expresses the contract between the parties. I cannot cut down the meaning of the word in that way. The judgment delivered by Bowen, L.J., in *Ex parte Stanford* (1) was relied upon. His lordship there said that a bill of sale was in accordance with the form if it was substantially in accordance with it, and that a divergence from the form was only material if it was calculated to alter the legal effect of the bill of sale or to mislead. But the Court was there dealing with a case where the error was one relating to the effect of the contract; so the judgment must be read with reference to that, and it must not be taken as intended to lay down a rule that nothing is a material departure from the form unless it alters

(1) 17 Q. B. D. 259, 269.

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the effect of the instrument. Then it is said, that "add witness's name, address, and description," is no part of the form, but a mere direction outside the form. I do not so regard those words. They are a direction as to matters which have to be stated at the time when the bill of sale is given. The form contains a number of blanks for matters which could not be stated in a form, but which must be filled up to make a bill of sale in accordance with the form. Thus, for instance, the interest is left blank in the form. Can it be doubted that a bill of sale in which that blank was not filled up would be void? The time of payment is left in blank, but it clearly is essential that the blank should be filled up. I do not see how we can get out of this part of the form—a blank left to be filled up with an express direction that it shall be filled up. I do not say that the omission to do so alters the legal effect of the instrument; but the House of Lords in *Thomas* v. *Kelly* (1) clearly held that a divergence from the form was not necessarily immaterial because it did not alter the effect of the instrument. I do not look upon the divergence in the present case as a mere immaterial one. The Act of 1878 required that every bill of sale should be attested by a solicitor. The Act of 1882 repealed that enactment, and when that requirement was done away with it became a matter of substance that the attesting witness should be so described on the face of the document as to shew what sort of person he was. I say nothing as to the policy of the legislature; we have only to give effect to what it has enacted, and I am of opinion that the omission of the name and description is fatal. The second case is harder than the first; but even in the second appeal I do not see how we can get over the words of the Act, and in my opinion both appeals fail.

LINDLEY, L.J. I am sorry that I cannot see my way to any other conclusion. It is a hard thing to be obliged to upset a fair transaction because t's are not crossed and i's not dotted; but we must give effect to the Act, and I cannot see that a document is in accordance with the form unless all particulars are filled up which the form requires to be filled up.

(1) 13 App. Cas. 506.

LOPES, L.J. The Act of 1882 imposes very stringent regulations on instruments dealing with goods and chattels. It has been said to be imperious and tyrannical; but with that we have nothing to do. Sect. 8 enacts that every bill of sale shall be duly attested, and s. 9 that a bill of sale given by way of security shall be void if not made in accordance with the form in the schedule. I should be inclined to hold that in cases to which s. 9 applies, the words "duly attested," in s. 8, must be read as meaning attested in accordance with the form; but I do not think it necessary to decide that; s. 9 says that the bill is void if not made in accordance with the form in the schedule, and the scheduled form concludes with an attestation clause followed by the direction, "add witness's name, address, and description." It is impossible to say that the particulars required to be inserted are not to be treated as part of the form. They could not be contained in the scheduled form, but they are required to be inserted, and when filled in they form part of the statutory form, and it is impossible to say that a bill of sale in which they are not filled in is in accordance with the form. I agree with Cotton, L.J., that this is not a mere technicality, but a matter of substance. One of the two cases is harder than the other, but the same principle governs both of them.

*Appeals dismissed.*

Solicitors in *Parsons* v. *Brand*: *Morse, Hewitt, & Farman*; *George Whale.*

Solicitors in *Coulson* v. *Dickson*: *Allen & Son*; *Hervey, Smith & Co.*

H. C. J.

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*May* 8, 9.

[IN THE COURT OF APPEAL.]

## COCHRANE *v.* ENTWISTLE.

*Bill of Sale—Validity—Deviation from Statutory Form—Assignment of Personal Chattels with Tenant Right Valuation, &c.—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

A bill of sale assigned to the mortgagee as security for an advance to the mortgagor, who was a farmer, all the furniture and other personal chattels specifically described in the schedule thereto annexed "now in and about the premises known as Poultney Lodge Farm, together with all the tenant-right valuation, goodwill, tillages, and interest of the mortgagor in and to the said farm lands and premises." The schedule contained a specific enumeration of all the articles of furniture and other personal chattels comprised in the deed, with the addition of the above words "together with all the tenant-right valuation, &c":—

*Held* (affirming the decision of Manisty, J.), that, inasmuch as the schedule comprised chattels real as well as personal chattels, the bill of sale was not made "in accordance with" the statutory form, and was void.

APPEAL by the plaintiff against the judgment of Manisty, J., at the trial of the action for the defendants.

The action was brought by the grantee of a bill of sale against the sheriff of Leicestershire, for an alleged wrongful conversion by the defendant of chattels which the plaintiff alleged to be his property.

On February 28, 1888, Mary Beebe, who occupied a farm called Poultney Lodge Farm, executed a bill of sale in favour of the plaintiff. By this deed Mary Beebe (described as the mortgagor) in consideration of 50*l.* paid to her by the plaintiff (described as the mortgagee) assigned to the plaintiff "all and singular the several chattels and things specifically described in the schedule hereto annexed or hereinafter written now in and about the premises known as Poultney Lodge Farm, together with all the tenant-right valuation, goodwill, tillages, and interest of the mortgagor in and to the said farm lands and premises, by way of security for the payment of the said sum of 50*l.*, and interest thereon at the rate of 60 per cent. per annum. And the mortgagor doth further agree and declare that she will duly pay to the mortgagee the principal sum aforesaid, together with the

interest then due, by quarterly instalments of 10*l.* 13*s.* 9*d.* each, the first instalment to become due and payable on May 28th next, and a like amount on the 28th day of each succeeding third month, and in default of payment of the principal sum or any instalment thereof when due, then the mortgagor will pay interest thereon at the rate aforesaid until full payment of the same. And the mortgagor doth also agree with the mortgagee that she will—(1) Pay all rent, rates, and taxes due, or as they become due and payable, in respect of the premises on which the said chattels and things shall be, and will upon demand in writing by the mortgagee produce to him her last receipts for rent, rates, and taxes, unless reasonable excuse for not so doing shall be shewn. (2) Keep insured the said property from fire. Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the mortgagee, for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

The schedule contained an enumeration of the different articles of furniture and household goods contained in each room respectively of the farm-house, and the last clause was as follows:—

"Stables, land and outbuildings—

"Three cart horses, 6 cows, 8 two-year-old heifers and steers, 5 yearling heifers and steers, 9 acres of wheat, 9 acres of oats, 2 acres of barley, 2 ricks of hay, roll, 2 sets of harrows, 3 ploughs, winnowing machine, root pulper, wagon, 2 carts, 6 sets of harness, 21 sheep, 6 pigs, 50 head of poultry, and a quantity of other chattels and effects, together with all the tenant-right valuation, goodwill, tillages, and interest of the mortgagor in and to the farm known as Poultney Lodge Farm."

The deed was duly registered under the Bills of Sale Acts. The defendant as sheriff, under an execution against the mortgagor, seized and sold the personal chattels comprised in the bill of sale.

Manisty, J., held that the bill of sale was void under the Bills of Sale Act, 1882, as regarded the personal chattels comprised in it, because it was not in accordance with the form contained in

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the schedule to that Act, and on this ground judgment was given for the defendant. The plaintiff appealed.

*Henry Kisch*, and *Horace Kent*, for the plaintiff. The learned judge held that the case was governed by the decision of this Court in *In re Burdett* (1); but that case is distinguishable. There a bill of sale, given as security for money, assigned to the grantee "the several chattels and things specifically described" in a schedule. The schedule comprised a number of "personal chattels," and also a gas engine which did not come within the definition of "personal chattels" contained in the Bills of Sale Act, 1878. It was admitted that the bill of sale was on other grounds not in the statutory form, and that it was, therefore, void as regarded the "personal chattels." This Court (reversing the decision of the Divisional Court) held that the deed was good as to the gas engine, because the illegal part of the security could be severed from the legal part. In the present case there is no variation from the statutory form, except in so far as the operative part of the deed and the schedule comprise, in addition to "personal chattels" some things which are not "personal chattels." So far as regards the "personal chattels" the deed is in the statutory form, and produces substantially the same legal effect, and is, therefore, valid: *Ex parte Stanford* (2); *Thomas* v. *Kelly*. (3)

*J. V. Austin*, for the defendant.

LORD ESHER, M.R. The plaintiff claims damages from the sheriff for wrongful conversion of chattels on the ground that they were his property, and he relies on a bill of sale executed by the judgment debtor as giving him a title. It lies on the plaintiff to make out his claim, and the question is whether the bill of sale was valid as against the execution creditor. The only departure from the provisions of the Bills of Sale Acts which can be alleged is, that the deed is not in the form given in the schedule to the Act of 1882. It is said that the deed is void as regards "the personal chattels," because it is not in that form, and this raises the question, whether the deed is in that

(1) 20 Q. B. D. 310. (2) 17 Q. B. D. 259.
(3) 13 App. Cas. 506.

form, or so nearly in it as to be equivalent as regards its legal effect. The bill of sale was given to secure the repayment of a loan of 50*l.* made by the plaintiff to the grantor. The security is stated to be, "the several chattels and things specifically described in the schedule," together with the mortgagor's tenant-right valuation, &c. The schedule comprises a number of "personal chattels," and also some chattels real. Is the bill of sale under these circumstances "in accordance with" the statutory form? Is it exactly like that form when the blanks in it have been filled in as they may be? It is clear to my mind that the only things which may be inserted in the schedule to the statutory form are chattels personal. Is the bill of sale, within the principle of *Ex parte Stanford* (1), substantially in accordance with the statutory form? One of the tests there laid down is, has it the same legal effect? In order to ascertain whether the two instruments have the same legal effect you must read the two as a whole, and if you do that it is obvious that they have not the same legal effect. But it is said that, according to our decision in *In re Burdett* (2), the security may be divided into two parts, and that as regards the "chattels personal" the security is in accordance with the statutory form, and for this purpose the chattels real may be treated as struck out of the deed. In my opinion *In re Burdett* (2) is not an authority for such a proposition. The question there was, whether a bill of sale, the schedule to which comprised chattels personal and also a chattel real, was good as regarded the latter, and it was held that it was. Chattels real are not within the Bills of Sale Act; it does not apply to them, and as regards them you are not subject to the fetter imposed by s. 9 upon the form of a bill of sale. I am bound by that decision, and indeed I think that case was rightly decided. But in my opinion it has no application to a case like the present, in which the question arises as to personal chattels which are within the Bills of Sale Act. In my opinion the decision of Manisty, J., was quite right.

FRY, L.J. The question is, whether this bill of sale is "in accordance with" the statutory form. That form is confined to

(1) 17 Q. B. D. 259. (2) 20 Q. B. D. 310.

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Fry, L.J.

an assignment of "all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security." The rule laid down in *Ex parte Stanford* (1) is, that you are to take the statutory form and the instrument which is in question, and to consider whether the two differ substantially in their legal effect—whether the one has a greater or a less legal effect than the other. Applying this test, has the present bill of sale substantially the same legal effect as the statutory form? Plainly it has not. The one applies to personal chattels only; the other applies to personal chattels and also to chattels real. Consequently the bill of sale is not made "in accordance with" the statutory form, and it is void as regards the personal chattels.

LOPES, L.J. The important words in the statutory form are "chattels and things," and, in my opinion, those words relate to "personal chattels" and nothing more. In the present case the schedule comprises not only personal chattels, but also chattels real. Therefore, to my mind, it is perfectly clear that the deed is not in the statutory form, and it is equally clear that it has not the same legal effect, because it deals with things which are entirely outside the Bills of Sale Act.

LORD ESHER, M.R. I desire to add that, if the argument for the appellant were to prevail, the protection which the Bills of Sale Act was intended to give to ignorant and careless borrowers would be done away with.

*Appeal dismissed.*

Solicitors: *Cooper & Sons*; *Crouders & Vizard.*

(1) 17 Q. B. D. 259.

W. L. C.

THE GOVERNORS OF CHARTERHOUSE SCHOOL, APPELLANTS; LAMARQUE, RESPONDENT.

1890
*Jan. 22, 23; April 20.*

*Revenue—Inhabited House Duty—Exemptions—"Hospital or Charity School"—School mainly self-supporting—48 Geo. 3. c. 55, Sched. B., Case IV.—14 & 15 Vict. c. 36, s. 2.*

By 48 Geo. 3, c. 55, Sched. B. (repealed by 4 & 5 Will. 4, c. 19, but re-enacted by 14 & 15 Vict. c. 36) "any hospital, charity school, or house provided for the reception or relief of poor persons," is exempted from inhabited house duty.

By charter granted to the founder by James I., and confirmed by statutes of 3 Car. 1, the Charterhouse was established in London as a hospital for the reception and relief of poor people, and as a free school for the maintenance and education of poor children or scholars, not to exceed forty in number; and it was a hospital and charity school within the exemption at the time of the passing of 48 Geo. 3, c. 55. In 1867, the school was removed, under statutory powers, from London to Godalming, the hospital remaining in London. In 1888 the governing body were assessed to inhabited house duty in respect of the school buildings, other than the portions occupied by the masters as their residences. The school had then become a public school numbering 500 boys. The scheme of the foundation had been altered or modified by statute by providing a limited number of scholarships and exhibitions of certain annual values to be paid out of the funds belonging to the foundation. No portion of the school buildings was set apart for the use of boys holding scholarships or exhibitions. The parents of boys not on the foundation paid large fees for their tuition and board, and by far the larger portion of the school could be carried on without the aid of the charitable foundation:—

*Held*, that the liability of the governing body to pay inhabited house duty depended upon the character of the school buildings at the time of the assessment; and that the Charterhouse School, having substantially ceased to be a charity school at that time, the exemption of 48 Geo. 3, c. 55, did not apply to relieve the governing body from liability.

CASE stated by Commissioners of Income Tax, under 43 & 44 Vict. c. 19, s. 59.

This was an appeal by the governing body of Charterhouse School against an assessment in respect of inhabited house duty upon the schoolhouse and buildings in connection with the school, except the masters' houses.

The facts and arguments are sufficiently stated in the judgment. (post, p. 122.)

*Cur. adv. vult.*

*Jeune, Q.C.*, and *Lewis Coward*, for the appellants.

*Sir E. Clarke, S.G.*, and *Dicey*, for the respondent.

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GOVERNORS OF CHARTERHOUSE SCHOOL v. LAMARQUE.

April 29. The judgment of the Court (Pollock, B., and Hawkins, J.), was read by

POLLOCK, B. The governing body of Charterhouse School appeal against an assessment for inhabited house duty made by the Commissioners acting for the Division of Godalming, on December 3, 1888, upon premises used as a sanatorium called "Uskites," and also upon the schoolhouse and buildings connected therewith other than the portions occupied by the head master and assistant masters as residences. The school consists of the school itself and the head master's and two assistant masters' houses, each under one roof and adjoining to each other, and of a chapel, library, large hall and class rooms, two sanatoriums, and other buildings which are not in actual communication with the main building, but all in a group except the sanatorium called "Uskites."

Inhabited house duty is now payable by virtue of the 14 & 15 Vict. c. 36. By sect. 2 the provisions of the 48 Geo. 3, c. 55, Sched. B (which had been repealed by 4 & 5 Will. 4, c. 19), are by reference re-enacted. By that schedule the duty is made payable upon "all inhabited dwelling-houses" the occupiers of which for the time being are made chargeable, and rules are made for charging the duty. The schedule also contains a table of exemptions, and by one of these, Case IV., "Any hospital, charity school, or house provided for the reception or relief of poor persons," is exempted. The appellants contend that the whole school premises except the masters' houses come within this exemption. The commissioners decided against this contention, and we have now to say whether they were right in so doing.

The foundation of Charterhouse dates from a royal charter granted in the ninth year of James I., whereby Thomas Sutton was empowered to found and establish in "the late dissolved Charterhouse beside Smithfield, in the county of Middlesex," one hospital house or place of abiding for the finding, sustentation, and relief of poor, aged, maimed, needy, or impotent people; and the founder, and after his death the governors, were empowered to place in the hospital a master and such numbers of poor people, men and children, as should from time to time be convenient. By the same charter, further power was given to

Thomas Sutton to found and establish at the same place one free school for the instructing, teaching, maintenance and education of poor children or scholars; and similar power was given to the founder, and after him to the governors, to place in the school such numbers of poor children or scholars as should be from time to time convenient. The foundation of the hospital (in which the school was included) was confirmed by the 3rd Car. 1, and by another statute of the same year, whereby provisions were made for the constitution, management, and conduct of the establishment. The poor brothers to be placed in the hospital were not to exceed four-score in number. The scholars of the foundation were limited to forty. They were fed, and received certain clothing. This was the character of the hospital and school in the seventeenth century. The school, however, underwent a considerable development, and a large number of pupils became attached without participating in any of the advantages of the foundation. In 1867 it was thought desirable that the school should be moved into the country, and to give the necessary powers for this purpose the Charterhouse School Act (30 & 31 Vict. c. 8 (private)) was passed. By this Act the governors were empowered to sell the school buildings in Charterhouse, and to purchase a site not exceeding 100 acres elsewhere, with all the requisite appurtenances, on which they might erect buildings for the purpose of a school, with a chapel, dwellings, and suitable offices, playground, yards, garden, approaches, conveniences, and appurtenances. All scholarships, exhibitions, and endowments belonging to the then existing school were to belong to the school when removed, and all powers and provisions contained in the royal charter and other statutes before mentioned were to continue in full force and effect, except so far as they were inconsistent with the Act. Under the powers of this Act a site was purchased at Godalming; all the requisite buildings were erected, and the school was removed there, the Hospital remaining at the original site in London. In pursuance of the Public Schools Act, 1868, special commissioners were appointed for determining and establishing the constitution of the new governing body; and in 1871 a statute was framed by them containing provisions for that purpose; and under the statute for the government of the school,

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as altered by an Order in Council of March 3, 1883, the mode of enjoying the privilege of the foundation is modified and altered, and a system of scholarships and exhibitions is established, whereby senior and junior scholarships with certain rules and regulations as to their number, value, and the qualifications of the competitors for them, now exist. The senior scholarships are not less than thirty in number, and of the annual value of 80*l.* Admission to such scholarships is by competitive examination, and open to all boys who have been at the school at least twelve months previous to the commencement of the examination, and between the ages of fourteen and sixteen. The junior scholarships are thirty, and of the annual value of 60*l.*, and the competitors are from twelve to fourteen years old; but in the case of these scholarships the governing body have power, if it appears to them that any successful candidate is in point of circumstance not fit to receive the aid of an endowment, to withhold from the scholarship to which such candidate shall have been elected the payment of 60*l.* per annum. Besides these, there are ten exhibitions of the annual value of 20*l.*, open to all boys at the school under fourteen years of age, and tenable till sixteen; twenty exhibitions tenable after quitting the school of the annual value of 80*l.*; and also an exhibition called "Lady Holford's Exhibition." With regard to the payment of the scholarships at the school, the governing body pay out of the school fund to the master of a boarding house for every senior scholar in such house 55*l.* per annum, and for every junior scholar in such house 35*l.* per annum, and in the case of exhibitioners a sum of 20*l.*; and, further, they also pay out of the school fund to the "tuition fund" for every scholar the annual tuition fee of 25*l.* Lastly, with regard to the fees payable by scholars not on the foundation, the annual "tuition fee" for every boy is 25*l.*, payable in equal instalments at the end of each term; the boarding house charges for each boy (not a scholar) are 80*l.* per annum; an annual capitation charge of 5*l.* is made on each boy, with the exception of the scholars, for the purpose of increasing and maintaining the school buildings; and in the case of the three boarding houses forming part of the main school building the amount of 3*l.* 6*s.* 8*d.* per term for every boy not holding a

scholarship is set aside to form a fund to be applied, at the discretion of the governing body, for certain purposes.

From this state of facts, it would appear that at the date of the passing of the 48 Geo. 3, c. 55, the buildings of Charterhouse in Middlesex would be properly described as that of a "hospital, charity school, or house provided for the reception or relief of poor persons," and so would be exempt at that time from house tax. This Act, however, was repealed, and its provisions were dormant until they were revived by the Act of 1851. (14 & 15 Vict. c. 36) At this date also the buildings of the Charterhouse were all still in Middlesex. Whether or no the character of the institution, in so far as the school was concerned, had been so altered as to deprive the school buildings of the benefit of the exemption, seems open to some doubt; but it is unnecessary for us to decide this. Even if the exemption still applied, this falls far short of establishing what the appellants are called upon to prove in order to support their contention, viz., that the buildings in question, which are at Godalming, were at the time of their assessment within the exemption. There is nothing in the language of the Act, or in its intention, to shew that the liability to, or the exemption from, taxation is to be fixed when the Act which authorized the taxation was passed. The whole language and object of the Act militate against this, and point to the conclusion that whether a particular building is taxable or not is to be determined by its status when the liability to taxation arises. At this date that portion of the foundation of the Charterhouse, which consisted of a hospital, remained in Middlesex. The school had before then been removed to Godalming, in Surrey, where new buildings, including those assessed, were erected for the purpose of carrying it on as remodelled by the new scheme and statutes. There is now at Godalming no hospital, giving to that word the widest meaning that it will bear. The hospital remained in London, and the buildings at Godalming are built for and used as a school only. Then arises the question, Can it be said that the buildings are those of a "charity school," giving to these words, as we think we ought to give, the largest interpretation that can fairly be put upon them in favour of those for whom the

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exemption is claimed? The case for the appellants was based upon the ground that the original foundation of the Charterhouse having been of an eleemosynary character, however its objects may have been altered, or its buildings and their character varied, the original exemption must attach; and further, that so long as some portion of the original character of the foundation remains, the exemption should be held to continue in its entirety, although, by the diversion of the objects of the foundation in part, it had to this extent lost its eleemosynary character. We cannot think that either of these arguments ought to prevail. As to the first, the language of the exemption in Case IV., coupled with that used in Case I., whereby the royal residences and public buildings are exempted, indicates clearly the intention to protect from taxation house property whence no profitable occupation is derived. It seems only necessary to apply this to the school buildings of Charterhouse at Godalming, to shew that they come neither within the letter nor the spirit of the exemption. Here are class-rooms, hall, chapel, library, sanatoriums, and other buildings, all necessary for and incidental to the carrying on of a large public school of a high class with 500 scholars, who are thereby furnished with all the requirements of comfort and refinement, and who on their part by themselves or their parents pay an annual tuition fee of 25*l.* for each boy, and a further amount of 5*l.* per head annual capitation charge, for increasing and maintaining the school buildings, some boys also contributing 3*l.* 6*s.* 8*d.* a term for other purposes. If the school in its present condition were of recent origin, we cannot conceive for a moment that it could properly be called a charity school, and, if it is not now, to say that it formerly was such, seems to us to be as much beside the question, as if it were said of an ancient royal palace or public building now converted into a warehouse or factory. As to whether some portion of the eleemosynary character of the foundation still remains, and to what extent, this is a question mostly of fact, and as far as it is one of pure fact, it is for the commissioners to decide rather than for this Court; but our conclusion is not arrived at upon this ground, for no doubt it is a mixed question of law and fact, and as such is a proper subject for appeal. It must be a question of degree, because upon the

facts stated it cannot be said that no part of the benefits obtained by the scholars are derived from the funds of the foundation, especially when reference is made to the scholarships; but, with respect to the particular buildings which have been assessed, the charitable character of the school generally bears no relation to one portion of the buildings rather than another, and therefore they cannot be severed so as to make the exemption apply to some of them and not to others. We can only deal with this part of the case in the way in which all questions of degree, in which the Court is challenged to point out what is the dividing line, ought to be dealt with, namely, by saying we must look at the matter substantially, and ask ourselves whether, taken as a whole, the modern school of Charterhouse is a charity school. One mode of testing this would be by considering whether by far the larger portion of the school could not be carried on without the aid derived from the charitable foundation, and as to this there seems to be no doubt that it could. Any number of instances may be suggested bearing more or less upon the question. One was dealt with by Denman, J., in *Blake* v. *Mayor of London* (1), where he says: "A hospital would not be the less entitled to the exemption because certain fees were taken from rich persons who chose to take the benefits of the hospital." We entirely agree with this. Where, however, a school is in the main self-supporting, we do not think it could properly be called a charity school because a small proportion of the scholars derive benefit from the charitable foundation whence it originally sprang. As each case depends upon its own particular facts rather than the application of the language of the exemption to those facts, it cannot be expected that much authority should be obtained bearing immediately upon the matter before us. We were referred, however, to *Needham* v. *Bowers* (2), where buildings were assessed to the inhabited house duty which belonged to an institution for the reception of insane persons, which was founded by charitable donations, but unendowed. It was vested in trustees, and managed gratuitously by a committee, and supported wholly out of payments made by the patients, of whom some paid more, some paid less, than the cost of their maintenance,

(1) 18 Q. B. D. 437, at p. 445. (2) 21 Q. B. D. 436.

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and a few were maintained gratuitously. After paying expenses, there was an annual surplus of profits, which was expended in enlarging and improving the institution. It was held that the institution, being wholly self-supporting, was not exempt as a "hospital" within the exemption we are now dealing with, which it was said must be restricted to "hospitals maintained wholly or in part by charity." Here there was no charitable element whatever. The language of the Court as to a hospital maintained "in part by charity" might seem to militate against our view; but the judges clearly had no such case as is now before us in their minds when this remark was made. The case of *Blake* v. *Mayor of London* (1) was cited on behalf of the appellants as shewing that the school buildings and grounds of the City of London School were held to be exempt from income tax. This case, however, presents no true analogy, for the assessment and the decision of the Court were based upon the language of s. 61, r. 6, of 5 & 6 Vict. c. 35, which provides that allowances in respect of property tax, levied under Schedule A. of the Income Tax Acts, are to be made by the commissioners for the duties charged "on any hospital, public school, or almshouse, in respect of the public buildings, offices, or premises" belonging thereto. The Court held that the application of these words was not limited to public schools maintained wholly by charity, but that they applied to a public school maintained partly by charitable endowments and partly by fees charged for instruction. One ground for this construction was based on the consideration that the same rule exempts "any college or hall in any of the universities of Great Britain in respect of the public buildings and offices belonging to such college or hall"; and Denman, J., in giving judgment, says: "The enactment seems to have been drawn with a mixed intention, namely, to exempt charitable institutions and to exempt certain institutions partly depending on charity, perhaps in view of the beneficial character of the objects of those institutions." The case of *Reg.* v. *Commissioners of Income Tax* (2) was also cited for the appellants; but as this was an assessment, not for inhabited house duty, but for income tax, and depended upon the proper meaning to be given to the words "charitable

(1) 18 Q. B. D. 437. (2) 22 Q. B. D. 296.

purposes," we do not feel that any benefit would arise from our dealing with it upon the present occasion.

In the result we hold that the commissioners came to a correct conclusion when they decided that the buildings in question are not entitled to the exemption from inhabited house duty which was claimed for them by the appellants, and we dismiss the appeal with costs.

*Judgment for the Crown.*

Solicitor for appellants: *H. W. Lee.*

Solicitor for respondent: *Solicitor to Inland Revenue.*

W. A.

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[IN THE COURT OF APPEAL.]

*May* 6, 9, 12.

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*Revenue—Income Tax—Deductions—Premium on Life Insurance—Foreign Insurance Company*—16 & 17 *Vict. c.* 34, *s.* 54—16 & 17 *Vict. c.* 91, *s.* 1.

By the Income Tax Act (16 & 17 Vict. c. 34), s. 54, provision is made for the deduction from assessments under Schedule D. of the premium paid by the person assessed for an insurance on his life with any insurance company registered as therein mentioned; and by 16 & 17 Vict. c. 91, s. 1, the benefit of the provision is extended to any person who shall have insured his life "in or with any insurance company existing on the 1st November, 1844, or in or with any insurance company registered pursuant to 7 & 8 Vict. c. 110":—

*Held* (Fry, L.J., doubting), that this provision does not apply to an insurance with a foreign company, even though that company was in existence on November 1, 1844, and has an office in England.

Decision of Queen's Bench Division (24 Q. B. D. 491) affirmed.

APPEAL against the judgment of the Queen's Bench Division (Pollock, B., and Hawkins, J.) (1), upon a case stated under 43 & 44 Vict. c. 19, s. 59.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts, William Frederick Heddon appealed against an assessment of 62*l.*, under Schedule D. of 16 & 17 Vict. c. 34, for the year ending April 5, 1887, made upon him, and claimed that he should be allowed by way of deduction from the assessment the sum of 6*l.* 4*s.* 2*d.* paid by him in 1886 as one year's premium in respect of an insurance upon his life for 300*l.*,

(1) 24 Q. B. D. 491.

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effected by him with the New York Life Insurance Company, by a policy dated December 5, 1883.

The company was incorporated by a special Act of the Legislature of New York, dated May 21, 1841, as a marine and fire insurance company, extended by an Act of State, dated April 18, 1843, to life insurance. The company had an office in London.

It was contended by the surveyor of taxes that the provisions of the Acts (1) cited in the case referred only to insurance com-

(1) By 16 & 17 Vict. c. 34, s. 54: "Any person who shall have made insurance on his life . . . . or shall have contracted for any deferred annuity on his own life . . . . in or with any insurance company which shall become registered under any Act to be passed in the present session of Parliament for that purpose, and which shall comply with the requirements of such Act, . . . . shall be entitled to deduct the amount of the annual premium paid by him for such insurance or contracted for . . . from any profits or gains in respect of which he shall be liable to be assessed under either of the Schedules D. or E. of this Act, or to have any assessment which may be made upon him under either of the said schedules reduced or abated by the deduction of the amount of the said annual premium from the amount of the profits or gains on which such assessment has been made."

By 16 & 17 Vict. c. 91, after a recital of the above-mentioned Act, and a recital that, as it might happen that an Act for the registration of insurance companies might not be passed in the then present session of Parliament, it was expedient that the benefit of the recited provision should for a limited time be extended to persons insuring or contracting with such insurance offices as thereinafter mentioned, it was enacted:—

Sect. 1: "Any person who shall have made any such insurance, or contracted for any such deferred annuity as in the said provision mentioned, in or with any insurance company existing on the 1st November, 1844, or in or with any insurance company registered pursuant to the Act 7 & 8 Vict. c. 110, for the registration, incorporation, and regulation of joint stock companies, shall be entitled to all the benefits and advantages which by the said provision are expressed to be given in respect of the like insurance or contract in or with any insurance company which shall become registered under any Act to be passed in the present session of Parliament for that purpose."

By s. 2 this Act was to continue in force until July 5, 1854. It was subsequently continued, and its provisions, as well as those of the previous Act of the same session, were in force on April 5, 1886.

By the Customs and Inland Revenue Act, 1886, s. 5: "All such provisions contained in any Act relating to income tax as were in force on the 5th April, 1886, shall have full force and effect with respect to the duties of income tax granted by this Act, so far as the same shall be consistent with the provisions of this Act."

panies existing in the United Kingdom, and did not relate to a foreign company such as the New York Life Insurance Company, and that, consequently, Mr. Heddon was not entitled to the deduction which he claimed.

The Commissioners were of opinion that the New York Life Insurance Company came within the provisions of 16 & 17 Vict c. 91, s. 1, and that Mr. Heddon was entitled to the deduction claimed by him.

On the appeal of the Crown, the Divisional Court reversed the decision, on the ground that foreign companies were not within the Act.

Mr. Heddon appealed.

May 6, 9. *Finlay, Q.C.*, and *Bremner*, for the appellant. The Income Tax Acts apply to Scotland, and if, as the ratio decidendi of the Divisional Court seems to indicate, the exemption in respect of the premium for a life insurance is confined to English companies, a Scotchman insuring his life with a Scotch company would not be entitled to the benefit of the exemption. The Act 7 & 8 Vict. c. 110, applies to Scotch companies only if they carry on business in England also. The registration Act, which the legislature had in contemplation when the Act 16 & 17 Vict. c. 34 was passed, would probably have applied to foreign insurance companies as well as to English ones; otherwise it would have given a special protection to English companies. The question whether the word "company" in an Act is confined to an English company, or whether it also includes foreign companies, must depend upon the scope and object of the Act: *Bulkeley* v. *Schutz* (1); *Newby* v. *Colt's Patent Firearms Co.* (2); *Henriques* v. *Dutch West India Co.* (3).

A similar question has arisen upon the Copyright Acts. In *Jefferys* v. *Boosey* (4) it was decided that a foreigner, who by residence in this country owed the Crown a temporary allegiance, was an "author" within the meaning of the Act 8 Anne, c. 19, and as such entitled to the copyright thereby conferred. In *Routledge* v. *Low* (5) it was held that the word "author" in the

(1) Law Rep. 3 P. C. 764.
(2) Law Rep. 7 Q. B. 293.
(3) 2 Ld. Raymd. 1532.
(4) 4 H. L. C. 815.
(5) Law Rep. 3 H. L. 100.

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Act 5 & 6 Vict, c. 45, was equally applicable to foreigners and to British subjects.

The objects of the two Acts of 1853 was to encourage thrift, not to regulate insurance companies. If an Act had been passed for the regulation of insurance companies it may be admitted that the presumption would have been that the legislature intended to deal only with companies constituted under English law. But the object of the Act being to benefit income-tax payers who insure their lives, there is no such presumption. The presumption is that at any rate any company which carries on business in England was intended. The true construction is, that any company which existed in 1844, and which carries on business in England is within the provision.

*Sir R. E. Webster, A.G.*, and *Danckwerts*, for the Crown. This is the first case in which it has been held that a person insuring with a foreign company is entitled to this exemption from income tax. It is a pure assumption that the Act for the registration of insurance companies, which was in contemplation when the first Act of 1853 was passed, would have required or permitted foreign companies to be registered. The first Act of 1853 contemplated an improvement in the law as to registration of insurance companies. It would be straining the general principles applicable to the construction of statutes to hold that, when the legislature in s. 54 spoke of "any insurance company," they had in contemplation foreign companies. They must have had in view the Act of 1844. Foreign insurance companies existing on November 1, 1844, could not be registered under that Act. That Act only imposed a penalty for non-registration; it did not prevent an unregistered company from carrying on business. In the first Act of 1853 companies which could be registered were referred to, not foreign companies. In the second Act of 1853 two classes of companies are referred to—(1.) Companies existing on November 1, 1844; (2.) Companies registered under the Act 7 & 8 Vict. c. 110. It may well be supposed that the legislature wished to induce insurance companies to register, and that for that reason they, by the second Act of 1853, gave the privilege of deducting from income-tax assessment the premium on a policy effected with a company which ought to have registered under

the Act of 1844, but had not done so, provided that the company was in existence on November 1, 1844. But there is nothing to shew that foreign companies were in the contemplation of the legislature. For the purposes of this Act a Scotch company is not considered a foreign company. It is not conceivable that the legislature should have intended to confer a benefit on foreign insurance companies which were established before November 1, 1844. Why should that particular date be selected? It had no application to foreign companies, but it had to English companies, because it is the date on which the Act of 1844 came into operation. It would be a strange anomaly if a distinction were made between foreign companies established before and after November 1, 1844. By the Act 18 & 19 Vict. c. 35, the privilege of deduction from assessment to income tax is extended to persons insuring with any friendly society legally established under any Act relating to friendly societies, and by 22 & 23 Vict. c. 18, the privilege is extended to any person contracting for a deferred annuity with the Commissioners for the Reduction of the National Debt. These Acts tend to confirm the view that only English companies were intended by the Act of 1853. There was no reason why the legislature, even if they did wish to encourage thrift, should encourage insurance with foreign corporations. At that time a foreign corporation could not be sued in this country, unless it was carrying on business here, and that exception was not established until 1872 in *Newby v. Colt's Patent Firearms Co.* (1) When they passed the first Act of 1853 the legislature contemplated only companies established under and regulated by an English statute, i.e., English companies; it cannot be supposed that when they passed the second Act of 1853 they had entirely changed their mind, and wished to include foreign companies well as English.

*Bremner*, in reply.

*Cur. adv. vult.*

1890. May 12. LORD ESHER, M.R. The appellant insists that he is entitled to a return of part of the income tax to which he has been assessed and which he has paid, because he has insured

(1) Law Rep. 7 Q. B. 293.

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his life with an insurance company, and that therefore he is entitled to have his assessment reduced by the deduction of the amount of the premium paid to the insurance company. The objection taken to his claim is this, that the company with which he has insured is the New York Life Insurance Company, incorporated by the legislature of New York, and that, even though that company has an office in England, yet it is a foreign company, and that the privilege given by the English Act to a person who has insured his life with an insurance company is limited to an insurance effected with a company subject to the laws regulating insurance companies of this country. The Divisional Court held that, on the true construction of the Act, the provision does not apply to an insurance with a foreign company, even though that company was in existence on November 1, 1844, and we have to say whether we agree with that decision or not.

Our decision must turn upon what is the true construction of s. 1 of 16 & 17 Vict. c. 91, which is in these terms: "Any person who shall have made any such insurance" . . . . (that is, an insurance on his life) "in or with any insurance company existing on the 1st November, 1844, or in or with any insurance company registered pursuant to the Act 7 & 8 Vict. c. 110."

Now it is obvious that the New York Company is not a company "registered pursuant to the Act 7 & 8 Vict. c. 110," and the only question is whether it is a company "existing on November 1, 1844." The New York Company came into existence under the laws of New York in 1841; so far it is undoubtedly a company "existing on November 1, 1844." It is strongly argued that it therefore comes within the very words, "with any insurance company existing on November 1, 1844." Now, supposing the words "any insurance company" stood alone, and there were nothing else in the section to modify the view which one would take of their meaning, would it or would it not be right to say, that those words in an English Act of Parliament would include all foreign insurance companies, wheresoever they might be? What is the rule of construction which ought to be applied to such an enactment, standing alone? It seems to me that, unless parliament expressly declares otherwise, in which case, even if it should go beyond its rights as regards the comity of

nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that parliament (unless it expressly declares otherwise) when it uses general words is only dealing with persons or things over which it has properly jurisdiction. It has been argued that that is so only when parliament is regulating the person or thing which is mentioned in the general words. But it seems to me that our parliament ought not to deal in any way, either by regulation or otherwise, directly or indirectly, with any foreign person or thing which is outside its jurisdiction, and, unless it does so in express terms so clear that their meaning is beyond doubt, the Courts ought always to construe general words as applying only to persons or things which will answer the description, and which are also within the jurisdiction of parliament. If, therefore, those words stood alone, I should be of opinion that the insurance companies mentioned must be insurance companies over which our parliament has jurisdiction, and that the section would be confined to such companies.

If the first part of the section stood alone it seems to me that one great difficulty in the case, viz., as to Scotch companies, would not exist, because Scotch companies are undoubtedly within the jurisdiction of our Parliament. But considerable difficulty arises upon the second part of the section, "or in or with any insurance company registered pursuant to the Act 7 & 8 Vict. c. 110," because s. 2 of that Act contains the words, "except Scotland." Scotland is expressly excepted, and Scotch companies, therefore, cannot be registered under that Act. They are, therefore, no doubt excepted from the second part of s. 1 of the Act 16 & 17 Vict. c. 91. But, if the first part had stood alone, I cannot see that Scotch companies would be excepted. Indeed I doubt whether the first part of the section, viz., "any insurance company existing on November 1, 1844," does not now include Scotch companies which were existing before that date, and, if that is so, a great part of the difficulty which has been presented to us vanishes.

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So the matter would stand if the words "any insurance company" were the only words in the section. But there are other words which, even if I am wrong in the general proposition which I have stated, seem to me to shew that the insurance companies mentioned in this section can only be companies which are either English or Irish, or English, Irish, or Scotch. The words are, "in or with any insurance company existing on November 1, 1844." If all companies, foreign or otherwise, were meant, why the reference to November 1, 1844? The reference is part of the description of the first-mentioned insurance companies, and it may help us to understand what companies were intended. When we look at s. 58 of the Act 7 & 8 Vict. c. 110, we find that "all joint stock companies to which this Act is hereinbefore made to apply, and which shall exist on November 1, 1844," are to be registered "within three months from the said November 1," and by s. 2 the Act is "to apply to every joint stock company established in any part of the United Kingdom, except Scotland, or established in Scotland and having an office or place of business in any other part of the United Kingdom for" (inter alia) "the purpose of assurance or insurance." We have, therefore, in the Act 7 & 8 Vict. c. 110, companies mentioned by a description part of which is "which shall exist on November 1, 1844," and which includes insurance companies, and when we find in s. 1 of the Act 16 & 17 Vict. c. 91, which we have now to construe, an insurance company described by the same words, it seems to me plain that, although that section does not, as I think, incorporate any part of the former Act, yet, looking at the similarity of the description in the two Acts, the same kind of company is meant in both Acts, inasmuch as the earlier Act was to come into operation on November 1, 1844. If that be so, the companies referred to in s. 1 of the later Act must obviously be companies of this kingdom, and not foreign companies.

But it was further suggested that the words of s. 1 will apply to a foreign company which has an office in England. I have already said that I think these general words must be taken to apply to something which comes within the description. It may be well argued that the words "insurance companies" will

include foreign companies; they are within the description; but to say that, if the words do not apply to all foreign companies, they apply to foreign companies which have an office in England is to add to the description the words, "which have an office in England," and that would be contrary to the ordinary canon of construction that you must not add words.

There is another reason, as it seems to me, why that the "insurance company," first mentioned in s. 1 must be an insurance company of this kingdom, viz., that the sentence goes on with a conjunction, disjunctive no doubt, "or in or with any insurance company registered pursuant to the Act of 7 & 8 Vict. c. 110." There the words "insurance company" clearly point only to insurance companies of this kingdom, and, if the words "insurance company" in the former part of the sentence are to apply to foreign companies, we should be giving different meanings to the same words in the same Act, in the same section, and within two lines of each other. That is a thing which ought not to be done, unless we are driven to it.

For these reasons I think that the words of s. 1 ought to be construed in the way which I have mentioned.

The difficulty could not have arisen upon s. 54 of the first Act of 1853. There it is clear that the companies with which the legislature were dealing were only companies of this kingdom, for the section has not in it the words, "or with any insurance company existing on November 1, 1844." The legislature having thus dealt only with companies of this kingdom in the first Act of 1853, can it be supposed, because they could not pass the intended Act for the registration of companies within the session and wanted further time, or were willing to give further time, that they should have entirely changed their mind, and have enlarged their view to this immense extent, so as to include, not merely companies under their jurisdiction which were existing on November 1, 1844, but all insurance companies in the world? I cannot believe it.

There are some other anomalies with which I shall not deal; they strengthen the view which I have expressed. But the real ground upon which I base my judgment is this, that as a general rule the words "any insurance company" in an English Act

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standing alone would only include insurance companies over which our parliament has properly jurisdiction, and when we see that those words are coupled with other words, which are part of the description of the company, and which obviously can refer only to companies under the jurisdiction of our parliament, the case becomes stronger than it would be if there were no such additional words, and it is clear to my mind that the only insurance companies meant are those which are within the jurisdiction of our parliament.

If an anomaly does arise, as has been suggested, with regard to Scotch companies existing on November 1, 1844, and having no place of business in England, it arises because of the words "except Scotland" in s. 2 of the Act 7 & 8 Vict. c. 110. I have already said, and I repeat it, that I doubt whether Scotch companies are excepted from the description in the second Act of 1853, but, if they are, we have to choose between two difficulties. The choice is between that anomaly, and another which is to my mind a much greater anomaly, viz., to suppose that our parliament was dealing with all insurance companies in the world. If there is this difficulty with regard to Scotch companies, it must, I think, have arisen by mere accident, and on being pointed out to the parliament which is now sitting, it would, I have no doubt, be cured in the shortest possible time, by the shortest possible Act, which would place insurances with Scotch companies in the same position as insurances with English companies. I am certain that such an Act would be passed without any difficulty.

For these reasons, I agree with the decision of the Divisional Court, and think that this appeal must be dismissed.

FRY, L.J. After the best attention I have been able to give to the construction of these Acts, I must confess that I have not been able to arrive at any conclusion of which I feel at all certain.

The legislation on the subject begins with the Act 16 & 17 Vict. c. 34, which provides for an exemption from income tax in the case of a person insuring his life with "any insurance company which shall become registered under any Act to be passed

in the present session of parliament for that purpose, and which shall comply with the requirements of such Act."

It is possible, of course, that the legislature may have contemplated an Act which should give permissive registration to foreign companies, provided that they should comply with certain conditions, just as the Act of 7 & 8 Vict. c. 110 enabled Scotch companies carrying on business in England or Ireland to register. But I think that the more probable reference is to insurance companies constituted according to the laws of the United Kingdom, and, if the matter had rested there, I should have thought that would be the more natural meaning of the words, "any insurance company." Then we come to the later Act of 1853, which was passed when the legislature found it impossible to carry through in that session the contemplated Act for the registration of insurance companies, and it was passed, as was then thought, merely for a limited time and as a temporary provision. Instead of that, it has remained in force from the year 1853 down to the year 1890. This Act, after a recital of the previous Act, and a recital that it might happen that an Act for the registration of insurance companies might not be passed in the then present session of parliament, gives the benefit of the exemption from income tax to persons insuring with two kinds of companies, viz., "any insurance company existing on November 1, 1844," and "any insurance company registered pursuant to the Act 7 & 8 Vict. c. 110."

The first thing which strikes one is this, that all insurance companies existing in England and Ireland on November 1, 1844, were required to be registered under the Act 7 & 8 Vict. c. 110, and, therefore, it is rather remarkable, if it was intended to confine the exemption to insurances with companies coming within the purview of that Act, that those companies which had violated the provisions of the Act for nine years should be the first class of companies mentioned. On the other hand, it is a very remarkable thing, if it was intended to give credit, so to speak, for the payment of premiums to a Scotch company or to a foreign company, existing on November 1, 1844, that the same privilege should not have been allowed in the case of such companies if they had come into existence after that date. Therefore, look

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FRY, L.J.

at it how you will, there are, as it seems to me, difficulties in either construction.

It has been strongly pressed upon us that the words, "any insurance company existing on November 1, 1844," must primâ facie mean a company constituted according to the laws of the United Kingdom, and the Master of the Rolls has taken that view. I confess that I am not able to follow him in that conclusion. I think that in construing an Act of Parliament we ought to look at the scope and object of the enactment. I have not the least doubt that, if the words, "any insurance company," were used in an Act which required the registration, or which regulated the constitution, of such companies, or which asserted any right, or proposed to do anything which, according to the comity of nations, could be imposed by a government only upon those who are subject to its legislation, the words would primâ facie mean an insurance company constituted according to the laws of the United Kingdom. But we are not now dealing with a case of that kind. The Act is conferring a benefit on persons —Her Majesty's subjects and others—who are liable to the payment of income tax. It creates an exemption in favour of persons who are making provision for their families by means of insurances on their lives. In such a case it does not seem to me very material whether the insurance company is a foreign one or one regulated by the laws of the United Kingdom. The legislature were thinking about the person who makes the payment, and the purpose of the payment, and were not, as it seems to me, at all concerned with the nature and constitution of the company to which the payment was to be made. But, although I am unable to agree with the argument, I nevertheless feel the pressure of the difficulties in the construction of the Act which have been insisted upon for the appellant, because it is anomalous to confer a benefit by reason of a payment made to a foreign company which existed on November 1, 1844, and not to confer the same benefit in the case of a similar payment to a foreign company which came into existence after that date. If I had been left to my own unaided intellect, I should probably have thought the sounder construction was, to take the words in their full and literal meaning, however startling the anomalies which

might result from so doing. But, as the learned judges of the Divisional Court, as well as my learned brethren the Master of the Rolls and Lopes, L.J., think that the words ought to be construed in the restricted manner for which the Crown contends, whilst I doubt, I am not prepared to differ from their conclusion.

LOPES, L.J. I agree with the judgment of the Master of the Rolls, and, were it not for the doubts which have been expressed by my brother Fry, I should have ventured to say that the case appears to me to be reasonably clear.

The question is, Is the appellant entitled to a deduction from his assessment to income tax in respect of a premium paid to an American company in which he is insured? The answer depends on whether the words, "any insurance company," occurring in s. 1 of the Act 16 & 17 Vict. c. 91, include foreign companies, or apply only to companies within the United Kingdom. It is clear, and, indeed, it is not disputed, that the deduction could only be claimed in respect of foreign insurance companies existing on November 1, 1844, and it is difficult to understand on what principle insurers with foreign companies existing on that day should be entitled, while insurers with such companies coming into existence after that date should not be entitled, to this deduction. There is, to my mind, great significance in the words, "with any insurance company existing on November 1, 1844, or in or with any insurance company registered pursuant to the Act 7 & 8 Vict. c. 110." The last-mentioned Act, which was for the registration of joint stock companies, was to come into operation on November 1, 1844. It was to apply to "every joint stock company, as hereinafter defined, established in any part of the United Kingdom of Great Britain and Ireland, except Scotland, or established in Scotland and having an office or place of business in any other part of the United Kingdom," for (among other things) "the purpose of assurance." This Act most clearly did not apply to or include a foreign company. Reading the words of s. 1 of the Act 16 & 17 Vict. c. 91, I am driven to the conclusion that the legislature meant any insurance company which existed and was carrying on business in England on November 1, 1844 (on which day the

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Act 7 & 8 Vict. c. 110 came into operation), or any insurance company registered pursuant to that Act. If this were not so, we should be putting a different construction on the words, "insurance company" when standing in close collocation—I think almost in the same line—making them when first used to include, and immediately afterwards to exclude, foreign insurance companies. Why, as I have already observed, the deduction should be allowed in the case of foreign insurance companies existing on November 1, 1844, and denied to such companies coming into existence after that date, and why the deduction should be allowed in the case of a foreign insurance company, though unregistered, whilst it is refused in the case of an English company unless registered, I am at a loss to understand.

I have listened carefully to the arguments, and I have not heard any explanation offered of these anomalies. They have not been explained by my learned brother Fry, L.J., who, I believe, could explain them if any one could. It is perfectly true that there is another anomaly to which he has alluded, viz., with regard to Scotch companies, but it appears to me that it is insignificant in comparison with those to which I have just referred. I believe, therefore, that the legislature in the section which is in contest contemplated only insurance companies amenable to the jurisdiction of the English parliament, and did not intend to include foreign companies. I think that the judgment of the Court below was right, and that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Ashurst, Morris, Crisp, & Co.; Solicitor of Inland Revenue.*

W. L. C.

[IN THE COURT OF APPEAL.]

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*May* 12

THE GUARDIANS OF HEADINGTON UNION, APPELLANTS; THE GUARDIANS OF IPSWICH UNION, RESPONDENTS.

*Poor Law—Settlement—Illegitimate Child—Place of Birth—Settlement derived from living Mother—Inquiry as to Settlement of Mother—Onus of Proof—4 & 5 Wm. 4, c. 76, s. 71.*

On appeal against an order of removal of an illegitimate child under the age of sixteen years, whereby such child was adjudged to be settled in the place of its birth, it was admitted by the respondents that the child's mother was still living; but no evidence was given to shew that she had any settlement, nor, on the other hand, was there any evidence of failure by the respondents to make inquiries:—

*Held* (affirming the judgment of the Queen's Bench Division), that in the absence of proof that the mother had a settlement elsewhere, the burden of which proof—there being no evidence of failure by the respondents to make inquiries—was upon the appellants; the child must be deemed to be settled in the place of its birth.

APPEAL from the judgment of the Queen's Bench Division (1) on a case stated by quarter sessions on an appeal against an order of removal.

The pauper, Alice Mary Beckley, was an illegitimate child under the age of sixteen years, and the order of removal adjudged the place of her last legal settlement to be the parish of Headington, which was the place of her birth. The notice of chargeability and grounds of removal sent to the appellants stated the following as the particulars of the pauper's settlement in the appellant union:—

"The said Alice Mary Beckley is the illegitimate daughter of Alice Beckley, and was born on the 14th day of August, 1880, at Headington Workhouse, in the parish of Headington, in your union above named."

On the hearing of the appeal against the order, it was admitted by the respondents that Alice Beckley, the mother, was still living; but no evidence was given to shew that she had any settlement, nor, on the other hand, was there any evidence of

(1) 24 Q. B. D. 414.

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failure by the respondents to make inquiries. The appellants contended that in the case of an illegitimate child under the age of sixteen, with a mother still living, there was no presumption that the place of its birth was its place of settlement, and that before such child could be adjudged to be settled in the place of its birth there must be an inquiry into the settlement of its mother. The recorder, however, held that the birthplace of such a child was to be taken to be its place of settlement until the contrary was proved, and that the burden of such proof was upon the appellants. He accordingly affirmed the order.

The Queen's Bench Division affirmed the judgment of the recorder, and dismissed the appeal.

The appellants again appealed.

*Jelf, Q.C.*, and *Shortt*, in support of the appeal. The case of *Reg.* v. *St. Paul's, Covent Garden*, (1) is in point. The reason the date of the birth of the pauper in that case was material was that if the child was born after the 4 & 5 Wm. 4, c. 76, s. 71 (2), the order of removal to the birth settlement would have been bad. If the argument on the other side is correct, it was immaterial whether the child was born before or after the Act. The decision was that there was uncertainty on a material point, which point was the difference between the law before and after the Act, and the Court must, therefore, have considered that matter. The effect of the statute on the settlement of illegitimate children is that the birth settlement is displaced altogether.

*R. C. Glen* and *J. F. P. Rawlinson*, for the respondents, were not called on.

LORD ESHER, M.R. It has been admitted by both the counsel who have addressed us, that unless the case of *Reg.* v. *St. Paul's, Covent Garden* (1) establishes the rule they say it does, they have

(1) 7 Q. B. 232.

(2) 4 & 5 Wm. 4, c. 76, s. 71, enacts: "Every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right, and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen. . . ."

nothing to go on. Now, what does that case decide? Every parish which undertakes to give a notice of removal must state what is the settlement, in the parish to which they seek to remove, upon which they are going to rely. In that case they did not do so, and the judges said that the order was bad, because the evidence did not sufficiently disclose what was the settlement relied on, but was loose and insufficient in that respect. That case does, therefore, not substantiate Mr. Jelf's argument. If that case does not decide the point, then we are left as if it had never been decided, because in this case the removing parish does state, in the plainest possible way, the settlement upon which it means to rely.

I agree entirely with what my brother Lopes said in the course of the argument, that the law is that the parish which assumes to give notice of removal has a right to rely upon any alleged settlement in the other parish. If they give notice of an alleged settlement and cannot maintain it, as they cannot if another and superior settlement is proved, they fail. In this case they seek to remove an illegitimate child because it was born in the parish of Headington. That fact is not denied. It has always been held, at all events in the case of legitimate children, that if the authorities of a parish mean to rely on a superior settlement to the one on which the child or pauper is removed to their parish, it is on them to prove that superior settlement. It is said that does not apply in the case of an illegitimate child since the Act of Wm. 4; but I can see nothing in that Act to support that contention. It leaves the birth settlement untouched until or unless a superior settlement is proved, so that it is on those who wish to prove a superior settlement to find out and establish it. That appears to have been the law always, and to my mind it is the law now as to illegitimate children just as much as in the case of legitimate children, so that the judgment of the Divisional Court in this case is right, and for the reasons given by the learned judges. This appeal must be dismissed.

FRY, L.J. I am of the same opinion.

LOPES, L.J. I do not desire to say more than that I quite agree with the judgment which has been delivered by the Master

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of the Rolls, and with the judgment of the Divisional Court, which goes very fully into the case, and I think very correctly.

*Appeal dismissed.*

GUARDIANS OF IPSWICH UNION.

Solicitors for appellants: *Philpot & Son, for Hawkins, Ward, & Higgs, Oxford.*

Solicitor for respondents: *John Rexworthy, for A. F. Vulliamy, Ipswich.*

A. M.

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*May* 19.

[IN THE COURT OF APPEAL.]

THE RHYMNEY RAILWAY COMPANY *v.* THE RHYMNEY IRON COMPANY, LIMITED.

*Railway Company—Railway and Canal Traffic Act,* 1854 (17 *&* 18 *Vict. c.* 31), *ss.* 2, 3, 6—*Undue Preference—Set-off in respect of Overcharges—Interest —Demand—*3 *&* 4 *Wm.* 4, *c.* 42, *s.* 28.

The Railway Commissioners having decided, under ss. 2 and 3 of the Railway and Canal Traffic Act, 1854, that the plaintiffs, a railway company, were giving an undue preference over the defendants' company to another company, by charging such other company lower rates for the carriage of coal to certain docks than they charged the defendants for similar traffic, the defendants sought, in an action brought against them by the plaintiffs, to set-off or counter-claim, as being overcharges, amounts by which charges paid by them to the plaintiffs under protest for such carriage of coal, previously to the decision of the Commissioners, exceeded the rates paid by the other company:—

*Held*, that the case came within the decision in *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Denaby Main Colliery Co.* (14 Q. B. D. 209); that no action will lie in respect of a breach of s. 2 of the Railway and Canal Traffic Act, 1854; and, therefore, that the set-off or counter-claim failed.

A claim in the writ for interest upon the amount claimed from the date of the writ till payment or judgment is not a good demand for the purposes of 3 & 4 Wm. 4, c. 42, s. 28, which provides for the allowance of interest in certain cases "from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment."

APPEAL from the judgment of Grantham, J., at the trial without a jury.

The action was brought to recover the balance of an account for the carriage of defendants' goods by the plaintiffs in October, 1888. The indorsement on the writ claimed interest on the amount claimed at the rate of 5*l.* per cent. per annum from

the date of the writ till payment or judgment. The defendants paid a part of the amount claimed into Court, and with regard to the residue of the claim they pleaded a set-off or counter-claim.

The facts, as far as material, were as follows:—The plaintiffs had been charging the defendants for the carriage of coal to the Bute Docks at Cardiff rates, which were in excess of what they charged the Dowlais Coal and Iron Company, and which the defendants complained of as constituting an undue preference to the latter company. The defendants wrote to the plaintiffs on June 10, 1887, to the effect that they intended to apply to the Railway Commissioners in respect of the rates so charged by the plaintiffs, and that from the date of their letter they would only consider themselves liable to pay to the plaintiffs such rates as might after due inquiry by the Railway Commissioners be found to be the proper rates under the circumstances, and that any excess charged by them above such proper rates would be subject to recovery. Upon application to the Railway Commissioners by the defendants, under s. 3 of the Railway and Canal Traffic Act, 1854, they determined that the rates charged by the plaintiffs for the carriage of coal as aforesaid constituted an undue preference of the Dowlais Coal and Iron Company over the defendants within the meaning of the 2nd section of the Act, and by order, dated July 26, 1888, they enjoined the plaintiffs to desist from giving such undue preference to the Dowlais Coal and Iron Company, and ordered them to carry for the defendants on equal terms with the terms on which similar traffic was carried to the Bute Docks, Cardiff, for the said company. The plaintiffs had continued between June 10, 1887, and July 26, 1888, to charge the rates complained of by the defendants, which the defendants paid under protest. The defendants claimed to set-off against the residue of the plaintiffs' claim, after deducting the amount paid into Court, the amount so paid by them between the above-mentioned dates in excess of the rates paid by the Dowlais Coal and Iron Company, as being shewn by the decision of the Railway Commissioners to have been overcharged, and therefore being money to which the plaintiffs were not entitled, and received by them for the defendants' use; or alternatively

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they counter-claimed the same amount as damages for breach of the Railway and Canal Traffic Act, 1854. The learned judge, on the authority of *Denaby Main Colliery Company* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1), held that the set-off or counter-claim could not be maintained, and gave judgment for the plaintiffs for the balance of the plaintiffs' claim, after deducting the amount paid into Court, with interest at 4*l.* per cent. from the date of the writ.

*Jelf, Q.C.*, and *W. Graham*, for the defendants. The question raised in this case is whether, where the decision of the Railway Commissioners has established that there has been an undue preference within s. 2 of the Railway and Canal Traffic Act, 1854, the person or persons overcharged can recover the sums which they have paid under protest, and which are shewn by such decision to have been in excess of what they ought to have been charged for the carriage of goods. The 6th section of the Act no doubt provides that no proceeding shall be taken for any violation or contravention of the Act except in the manner therein provided, i.e., by application for an injunction or interdict under s. 3. It was held in this Court in *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Denaby Main Colliery Co.* (2) that no action would lie in respect of a breach of the provisions of s. 2. It is not denied, therefore, for the purposes of the present argument, that the Railway Commissioners are the sole judges whether there has been an undue preference, and that persons who allege that they are injured by such an undue preference within the meaning of the Act cannot raise by action, for the decision of a jury, the question whether there has been a breach of the provisions of the 2nd section; but it is submitted that it does not follow that, where the existence of such an undue preference has been already established by the decision of the Railway Commissioners, persons, who have paid under protest sums which such decision has shewn to be overcharges, cannot recover those sums, as money had and received, as being money extorted by duress or paid without consideration. There has already been a decision of the tribunal provided by the Act that

(1) 11 App. Cas. 97. (2) 14 Q. B. D. 209.

these charges are invalid; and it is submitted that upon that ground the defendants are entitled to recover them by action for money had and received. Such an action is not a proceeding for a violation or contravention of the Act within the meaning of s. 6. So far as any prospective remedy is concerned, no doubt the only mode of procedure is before the tribunal specially provided; but that tribunal has no power to give any retrospective remedy in respect of what their decision shews to have been overcharges in the past; and, if there can be no action to recover such overcharges, the result would be that the longer a railway company could protract the litigation before the commissioners, the longer they would be enabled to obtain an illegal and excessive rate for the carriage of goods. Sect. 6 may be read as referring to proceedings to determine the question whether there is a violation or contravention of the Act, i.e., whether there is an undue preference, the intention being that that question shall be decided only by the special tribunal provided by the Act; but, when it has been decided by the special tribunal that certain rates are illegal as constituting an undue preference, there is nothing in the Act to prevent what has been decided to be an overcharge from being recovered in an action for money received in the usual way. In *Denaby Main Colliery Co.* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (1) Lord Halsbury, L.C., says: "It may be that no action will lie expressly for a breach of that section"—i.e., s. 2—"but it is matter for consideration (and I wish to reserve my right to consider it if the question should hereafter arise) whether a railway company, having committed a breach of that section, and having in committing that breach extorted money for carriage to which by law they were not entitled, the ordinary remedies at law for extortion may not be applicable." And see per Cave, J., in *Lancashire and Yorkshire Ry. Co.* v. *Greenwood.* (2)

Secondly, the learned judge was wrong in allowing interest on the amount claimed. The claim on the writ is not a demand in writing within s. 28 of 3 & 4 Wm. 4, c. 42. The demand contemplated by that section is one before action.

*Bompas, Q.C.*, and *R. S. Wright*, for the plaintiffs, were only

(1) 11 App Cas. 97. (2) 21 Q B. D. 215, at p. 219.

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called upon with regard to the second point. The real scope of the provisions of 3 & 4 Wm. 4, c. 42, is that interest may be given as damages for non-payment of the debt not as part of the debt; and, that being so, there is no reason why the claim on the writ should not be a good demand within the 28th section.

LORD ESHER, M.R. The main point has, in my opinion, been already decided by authority binding on us. The question is really whether an action for money had and received can be maintained under the circumstances here existing in respect of the money paid under protest by the defendants to the plaintiffs. It has been decided in this court in the case of *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Denaby Main Colliery Co.* (1), that the only remedy, where it is alleged that there has been a breach of s. 2 of the Railway and Canal Traffic Act, 1854, is by application to the Railway Commissioners under s. 3; and the only remedy they can give has regard to the future, not the past; and therefore that past payments alleged to be overcharges by reason of being contrary to the Act could not be recovered by action. It was so held in this court in a carefully reasoned judgment delivered by my brother Lindley. That view was absolutely supported by what Lord Blackburn said in the House of Lords, and was certainly not overruled by what was said by the other lords. We are therefore bound by our own decision. I wish, however, further to say that I entirely adopt the reasoning by which my brother Lindley arrived at his conclusion in that case, which is made still stronger by what was said by Lord Blackburn. As to the other point with regard to the interest, I think that the contention for the defendants is well founded as to that, and that the amount for which the plaintiffs have obtained judgment must be reduced by the amount of such interest.

FRY, L.J. I am of the same opinion. I really cannot entertain any doubt as to the true reading of the enactments of the Railway and Canal Traffic Act, 1854. The provisions of that Act give certain remedies in the cases contemplated by the Act.

(1) 14 Q. B. D. 209.

But there were certain rights already under the existing law. The Act deals thus with the two classes of rights. With regard to the old rights, they are left intact, and the rights which existed before may be enforced after the passing of the Act. With regard to the new rights, they are only to be enforced in the manner specified by the Act. That seems to me the plain meaning, and, that being my view, I am glad to find that not only this Court but Lord Blackburn in the House of Lords came to the same conclusion.

LOPES, L.J. With regard to the principal question, I think that the terms of the 6th section of the Railway and Canal Traffic Act, 1854, as construed by the decision of this Court in *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Denaby Main Colliery Co.* (1), and by Lord Blackburn in the House of Lords in the same case (2), are conclusive of the matter. With regard to the claim of interest, I do not think the claim on the writ is a demand in writing within the meaning of the statute 3 & 4 Wm. 4, c. 42, and therefore the amount for which the judgment is given must be reduced accordingly.

*Judgment varied accordingly.*

Solicitors for plaintiffs: *Bompas & Co.*
Solicitor for defendants: *Howell Thomas, for Simons & Pleus.*

(1) 14 Q. B. D. 209. (2) 11 App. Cas. 117.

E. L.

1890
*June* 12.

CRANE, APPELLANT; LAWRENCE, RESPONDENT.

*Margarine Act—"Exposed for Sale"—50 & 51 Vict. c. 29, s. 6.*

By the Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6, if margarine "be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label" marked "Margarine," and by s. 4 penalties are imposed for offences against the Act.

The respondent kept margarine for sale in his shop, in a parcel which was not labelled, behind a screen, and not in sight of customers. There was no evidence that this was done for the purpose of evading the Act.

*Held*, that the margarine was not "exposed for sale" within the meaning of the Act, and the respondent was not liable to be convicted.

CASE stated by a metropolitan police magistrate.

The respondent was summoned for that he did unlawfully expose for sale by retail a parcel of margarine, there not then being attached to such parcel so exposed a label marked "Margarine," contrary to ss. 4, 6, and 7 of the Margarine Act, 1887 (50 & 51 Vict. c. 29).

The appellant was an inspector appointed by the vestry for the purpose of enforcing the Food and Drugs Act, 1875, and the Margarine Act, 1887.

The respondent carried on business as a retail dealer in butter, margarine, and other things at his shop.

On January 24, 1890, the appellant entered the respondent's shop, and asked the respondent's wife, who was then in charge, to serve him with half a pound of margarine.

She complied, cutting the portion required from a parcel of margarine which was then in the shop, and placing such portion in a paper wrapper upon which was printed the word "Margarine," in all respects as required by the Act.

This parcel of margarine from which the half-pound was taken was the parcel with reference to which the alleged offence was committed. At the time of the purchase it was placed on the counter, behind a screen similar to those used in butter-shops for the purpose of the butter, &c., being prepared for sale. Before making the purchase the appellant did not see, nor could he see, the parcel of margarine from the side of the counter on which he

stood, nor was it open to the view of any of the customers, unless they went behind the counter, where they were not, in fact, allowed to go.

The parcel was not in any case or package, and no label or mark of any kind was upon it to indicate that it was margarine, and it was obvious that, even if such label had been upon it, it could not have been seen by the customers so long as they remained upon their side of the counter.

There was no evidence that the parcel was placed behind the screen for the purpose of evading the Act, or except in the ordinary way of business.

On behalf of the appellant, it was contended that the respondent had, by placing the parcel of margarine in his shop for the purpose of being forthwith sold by retail, exposed the same for sale by retail.

On behalf of the respondent, it was contended that, inasmuch as the parcel of margarine was not and could not be seen by customers or other persons using the shop unless they went behind the counter, the same was not exposed for sale.

The magistrate was of opinion that, to constitute exposure for sale, the margarine must be in such a position as to be seen by customers standing in their usual place in the shop, and as the parcel of margarine in question could not be thus seen, and as a label upon it under such circumstances would be useless, he held that the offence was not committed, and dismissed the summons.

The question for the Court was, whether the magistrate was right in his decision, and if not, what should be done in the premises.

The Margarine Act, 1887 (50 & 51 Vict. c. 29), by s. 4 imposes penalties for offences against the Act.

By s. 6, "Every person dealing in margarine in the manner described in the preceding section shall conform to the following regulations: Every package, whether open or closed and containing margarine, shall be branded or durably marked 'Margarine' on the top, bottom, and sides, in printed capital letters, not less than three-quarters of an inch square; and if such margarine be exposed for sale by retail, there shall be attached to

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CRANE v. LAWRENCE.

each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters, not less than one and a half inch square, 'Margarine'; and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, 'Margarine.'"

*J. C. Earle*, for the appellant. The question turns on the meaning of the words "exposed for sale" in s. 6. The words only mean put out for the purpose of sale, and do not necessarily signify that the article must be exposed to sight. It is clear that a person might be convicted, under 24 & 25 Vict. c. 100, s. 27, of exposing a child, although the child might be covered up and entirely hidden from view.

The respondent did not appear.

CAVE, J. I am of opinion that the objection taken on behalf of the appellant cannot prevail, and that the decision of the magistrate was right.

Sect. 6 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), prohibits the exposure for sale by retail of margarine without a printed label stating that it is margarine; and s. 4 imposes penalties for offences against the Act. It is a sound rule of construction that when any penalty or disability is imposed by statute on any of Her Majesty's subjects, the Court before which any charge is preferred must be able to see clearly what the conduct is which will render a person liable to the penalty so imposed. The word "exposed," which is the word used in s. 6, may have different meanings according to the circumstances of the different cases in which it is used; it may mean exposed to the air; it may mean exposed to water; it may mean exposed to view. In each case one must look to the surrounding circumstances in order to ascertain what the word means. In the present case it must mean exposed to view. It is clear that the intention of the statute is that there shall be an exposure to the purchaser, in order that he may see what the article is, and may know what he

is buying, and may not buy a portion of some article which he sees in the shop and asks for without ascertaining what it really is. To hold the contrary would be to impose an unnatural signification on the language of the statute. Take the case of a small dealer, who has not room in his shop to keep his stock, and therefore keeps the article in a cellar, and, when a customer comes in and asks for it, goes down and gets the quantity required. It would be absurd to say that he must attach a label to the article while in the cellar; and this could not be done so as to bring the case within the Act, for the label is to be attached "in such manner as to be clearly visible to the purchaser." The meaning of the statute is, that, if the article is exposed to view for sale in the shop, a label must be attached.

A. L. SMITH, J. I am also of opinion that the decision of the magistrate was right.

I think the words "exposed for sale" mean exposed to view in the shop in the sight of the purchaser. If the magarine is put in the shop for sale, and put in a place where it is visible to customers, then it is exposed for sale within the meaning of the Act, and must be labelled; but unless it is thus exposed to view the Act does not apply.

*Judgment for the respondent.*

Solicitor for the appellant: *Walter William Young.*

P. B. H.

1890
April 23.

HUBBARD AND ANOTHER v. GOODLEY.

*County Court—Reduction of Claim by "admitted Set-off"—Admission of Plaintiff only—Jurisdiction—51 & 52 Vict. c. 43, s. 57.*

By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 57, where in any action the debt or demand claimed consists of a balance not exceeding 50*l.* after an "admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff," the Court shall have jurisdiction to try such action:—

*Held*, that the "set-off" referred to in the section is a set-off the existence of which is admitted by both parties, and not merely by the plaintiff.

APPEAL from Wisbech County Court.

The action was by the plaintiffs as landlords against the defendant their tenant. It appeared from the particulars filed by the plaintiffs that they claimed for breach of covenant and

| | £ | s. | d. |
|---|---|---|---|
| dilapidations ascertained by valuation the sum of | 56 | 9 | 11 |
| deducting allowances as per valuation for manure left on land and oil-cake consumed . . . . | 14 | 9 | 11 |
| | £42 | 0 | 0 |
| and adding one-half valuer's charges . . . | 2 | 4 | 6 |
| | £44 | 4 | 6 |

It was objected on behalf of the defendant that the county court had no jurisdiction, because the defendant disputed the amount of the valuation, and therefore the sum for which credit was given could not be treated as an agreed sum so as to enable the plaintiffs to sue for a balance of account not exceeding 50*l.*

The judge held this objection good, and non-suited the plaintiffs.

*W. J. Brooks*, for the plaintiffs. The county court had jurisdiction under the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 57. The action was for a balance not exceeding 50*l.* after an "admitted set-off." The plaintiffs admitted the set-off, and it was not necessary that the defendant should do so. The cases

relied on by the defendant of *Woodhams* v. *Newman* (1), and *Beswick* v. *Capper* (2), were decisions on the words, "balance of account," in the County Courts Act of 1846 (9 & 10 Vict. c. 95), s. 58, which did not contain the words "admitted set-off," and in *Walesby* v. *Goulston* (3), decided upon the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 24, containing the same words as those now in question, viz., "an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff," the Court held that the words meant a set-off which the plaintiff chooses to admit at the time of action brought, and, although a doubt was certainly expressed as to whether there can be an admitted set-off without the consent of both parties, the consent of the plaintiff seems to have been deemed the essential requirement. The principle of that case has been extended by *Percival* v. *Pedley* (4), in which the Court held that s. 7 of the County Courts Act, 1867 (30 & 31 Vict. c. 142), providing for claims reduced by an "admitted set-off" applied where the set-off was admitted only by the plaintiff. That section, indeed, is one conferring power to remit actions to the county court, and not original jurisdiction, as in s. 57 of the Act of 1888; but the decision being upon the words "admitted set-off" applies to the present case, and the doubt expressed in *Walesby* v. *Goulston* (3), has been solved.

*Horace Browne*, for the defendant. The county court had no jurisdiction, as the set-off was not admitted by both parties. In *Walesby* v. *Goulston* (3), which was decided upon a section identical with s. 57 of the Act of 1888, the Court plainly considered that the set-off must be assented to by the defendant. *Percival* v. *Pedley* (4) arose on a provision in the Act of 1867 for remitting actions from the High Court to the county court, and moreover, it did not contain the words "claimed or recoverable" which follow the words "admitted set-off" in s. 57. In *Woodhams* v. *Newman* (5), Wilde, C.J., said, "It never could have been intended that these inferior tribunals should be

(1) 7 C. B. 654.
(2) 7 C. B. 669; 18 L. J. (C.P.) 216.
(3) Law Rep. 1 C. P. 567.
(4) 18 Q. B. D. 635.
(5) 7 C. B. 654, at p. 665; 18 L. J. (C.P.) 215.

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engaged in the discussion of mutual claims to an unlimited amount, merely because the ultimate balance might by means of a set-off be reduced to less than 20*l.*"

*Brooks*, in reply.

HUDDLESTON, B. The question is whether when a set-off by which a claim is reduced to an amount not exceeding 50*l.* is admitted by the plaintiff, but not admitted by the defendant, the county court has or has not jurisdiction to try the case. By s. 57 of the County Courts Act, 1888 (51 & 52 Vict. c. 43) "Where in any action the debt or demand claimed consists of a balance not exceeding 50*l.*, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the Court shall have jurisdiction to try such action." Does "admitted set-off" mean admitted by both parties, or merely admitted by the plaintiff? My opinion is that the words mean admitted by both parties—that each party admits there is a set-off. *Walesby* v. *Goulston* (1), is in my judgment conclusive on this point. It is true that it was under a different Act, but the words in question were the same, viz., an "admitted set-off" of a debt or demand "claimed or recoverable by the defendant"; and, although the decision was only that in 19 & 20 Vict. c. 108, s. 24, those words meant a set-off admitted before action brought, there are observations in the judgment which are material to the present question. Erle, C.J., in whose judgment, Willes, Byles, and Montague Smith, JJ., concurred, said: "I interpret this as meaning a set-off which a plaintiff chooses to admit at the time he sues in the county court . . . . I think the clause was introduced into the Act because some persons thought that the right of every suitor to resort to the Courts at Westminster Hall was one of the greatest value, and which should not be lightly taken away; but it was said if the parties choose to admit the set-off, then the plaintiff may sue in the county court. I think there is great doubt whether the set-off can be admitted by one party only; but here the plaintiff himself did not admit the set-off before action." *Percival* v. *Pedley* (2), was decided upon a different Act, and raised the

(1) Law Rep. 1 C. P. 567. (2) 18 Q. B. D. 635.

question whether the defendant denying liability could bring the case within the 7th section of the County Courts Act, 1867, so as to be entitled to an order transferring the action to the county court. I held at Chambers that he could not do so; my brothers Mathew and Cave, JJ., entertained a different opinion. But in *Percival* v. *Pedley* (1) the case of *Walesby* v. *Goulston* (2) was not brought under the consideration of the Court. With all respect to the decision in *Percival* v. *Pedley* (1), I do not think it applies to the present case; but if there is any doubt about the meaning of the words "admitted set-off" in s. 7 of 30 & 31 Vict. c. 142, on which *Percival* v. *Pedley* (1) was decided, it is to be observed that there are in the County Courts Act, 1888, s. 57, the words "claimed or recoverable by the defendant," which are not in the County Courts Act, 1867, s. 7. In the present case clearly the amount was not "claimed," and there was nothing to shew that it was "recoverable" by the defendant. I think that, under the circumstances, the proper form of our judgment is that the appeal should be dismissed with costs.

GRANTHAM, J. I am of the same opinion. If the contention for the plaintiffs were right, actions involving very large amounts might be brought in the county court. But I do not think that the effect of the argument and the cases cited is to extend the jurisdiction of that Court in the manner suggested. The decision in *Percival* v. *Pedley* (1), was upon a different enactment, viz., 30 & 31 Vict. c. 142 (County Courts Act, 1867), s. 7, which provides that where in an action of contract brought in the Superior Court the claim does not exceed 50*l.*, or where such claim though it originally exceeded 50*l.* is "reduced by payment, admitted set-off or otherwise," to a sum not exceeding 50*l.*, the defendant may apply for the transfer of the action to the county court. No such words as "claimed or recoverable by the defendant" are added; and, therefore, on that section it is possible to say that the admission of plaintiff is dealt with alone. That may be so under s. 7 of the Act of 1867, because there is the overriding control of the Superior Court which would decide on affidavits whether they would remit the action or not. But, if the

(1) 18 Q. B. D. 635. (2) Law Rep. 1 C. P. 567.

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plaintiffs are right in their contention, under the Act of 1888, s. 57, the defendant has no voice in the matter, and the Superior Court no control. Strong authority is needed to give such a wide construction as that contended for to the words "admitted set-off of any debt or demand claimed or recoverable by the defendant." In the present case there is no evidence that the set-off in the particulars was "claimed or recoverable by the defendant"; it appeared only that it was admitted by the plaintiffs.

*Judgment for defendant with costs.*

Solicitors for plaintiffs: *Smiles, Binyon, & Ollard.*
Solicitors for defendant: *Oldman & Clabburn.*

J. R.

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*May* 3, 5.

## FOOT *v.* HODGSON.

*Metropolis—Building Acts—Party Wall—Measurement of Height of Wall—Story—Metropolitan Building Act,* 1855 (18 & 19 *Vict. c.* 122), *ss.* 83, 85, *Sched.* 1.

By Sched. 1 of the Metropolitan Building Act, 1855, the thickness of the external and party walls of dwelling-houses and warehouses throughout the different stories is regulated in accordance with rules there laid down, the necessary thickness varying with the height and width of the wall; by r. 5, provision is made for the mode of measuring the height of every topmost story, and by r. 6, "the height of every wall is to be measured from the base of the wall to the level of the top of the topmost story:—

*Held*, that a "topmost story" need not necessarily be contained within four vertical walls, and that floors or rooms inclosed on three sides by vertical walls and in front by the sloping roof of the house were stories within the meaning of the schedule and rules.

APPEAL from a decision of the judge of the City of London Court, setting aside an award of surveyors made under s. 85 of the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122).

By s. 82 of the Metropolitan Building Act, 1855, which is the first of a series of sections relating to party structures, such one of the owners of premises separated by a party structure as is desirous of executing any work in respect to such party structure is termed the building owner, and the owner of the other premises the adjoining owner. By s. 83, the building owner is to have certain rights in relation to party structures, including (by sub-s. 7), "a right to pull down any party structure that is of insuffi-

cient strength for any building intended to be built, and to rebuild the same of sufficient strength for the above purpose, upon condition of making good all damage occasioned thereby to the adjoining premises." Sect. 85 provides rules as to the exercise of their rights by building and adjoining owners, and by sub-s. 7 provides for the reference to the arbitration of a surveyor or three surveyors of any difference between them, the award of the surveyor, or (if more than one be appointed) of any two of the surveyors, being by sub-s. 8, made conclusive, subject to an appeal to the county court within fourteen days from the date of the award.

The plaintiff and defendant were the owners of adjoining premises separated by a party wall; and some years before these proceedings the defendant's premises were burnt down, and were rebuilt with a sloping roof in front; in the roof there were two floors or rooms, of which one side was formed by the sloping roof, the other three sides being formed by the vertical walls at the rear and sides of the house. In 1889 the defendant's premises were again burnt down, and the defendant proposed to rebuild them in the same way, that is to say, with the two topmost floors contained by the sloping roof and three vertical walls; to this objection was made by the district surveyor, on the ground that the two topmost floors were "stories" within the meaning of the first schedule to the Metropolitan Building Act, 1855, and that if they were "stories" the party wall between the plaintiff's and defendant's premises was of insufficient thickness and did not comply with the requirements of the schedule as to the thickness of party walls. (1) The defendant decided to pull down the party wall and rebuild it of an increased thickness, and gave the plaintiff notice, under s. 85, of his intention; the plaintiff, however, objected to the proposed rebuilding of the party wall on the

(1) The first schedule to the Act contains (in Parts I. and II.) rules for calculating the thickness of external and party walls "throughout the different stories" according to the height and length of the walls; rule 5 of the "Preliminary" rules describes the mode of measuring the height of "every topmost story," and of the other stories, and rule 6, "Preliminary," provides that "the height of every external and party wall shall be measured from the base of the wall to the level of the top of the topmost story."

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ground that it would be injurious to his trade and was also unnecessary; his contention being that the two floors bounded by the sloping roof were not "stories" within the meaning of the schedule, and that if these were excluded from the calculation, the party wall as it stood was of sufficient thickness for the building which the defendant proposed to erect. This difference having arisen, each of the parties appointed a surveyor under s. 85, sub-s. 7, and the two surveyors appointed a third, and eventually two of the surveyors made an award, by which they found that the party wall was not of sufficient strength for the intended building; the plaintiff appealed from this award to the judge of the City of London Court, who heard the appeal with the assistance of assessors. It was admitted that the height of the wall, and, consequently, its thickness, must depend upon the way in which the measurement was made, the contention of the plaintiff being that a "story" could only mean a floor or flat inclosed by four vertical walls, and that the two topmost floors of the proposed building were merely attics in the roof and not "stories," and ought to be excluded from calculation in measuring the height of the wall, and that if this principle were adopted the wall was sufficiently thick; the defendant contended, in support of the award, that the floors were "stories" within the meaning of the schedule and were to be included in measuring the height of the wall, and that therefore the wall was of insufficient thickness. The judge and assessors decided in favour of the plaintiff's contention, being of opinion that the whole of the building above the story inclosed by four vertical walls upon which the rafters of the roof rested was roof, and that the rooms above bounded by the sloping roof were not "stories." And the award was thereupon set aside. The judge having certified that the value of the matter in difference exceeded 50*l.*, the defendant appealed under s. 102 of the Act.

*A. H. Spokes*, for the defendant. The sole question is the meaning of the word "story," and the county court judge was wrong in holding as a matter of law that a story must necessarily be inclosed within four vertical walls. It is, at any rate for the purposes of this Act, the same thing as a "floor" or "flat," and it makes no difference that it is bounded on one side by a sloping

roof. If it is to be held that floors or flats bounded on one side by a lofty sloping roof are to be excluded from computation in determining the sufficiency of the thickness of a party wall, the most serious consequences might result. The schedule itself affords a strong indication in favour of the defendant's contention, for rule 4 of the first part of the schedule speaks of the floor of "any story formed in the roof."

*Finlay, Q.C.*, and *Fullarton*, for the plaintiff. The decision of the county court judge was right. The question was one of fact, and it is impossible to hold that as a matter of law the judge was bound to hold that these were "stories" within the meaning of the schedule to the Act.

MATHEW, J. I am of opinion that this appeal should be allowed. It seems to me that the learned judge did not treat this as a question of fact, but that he was influenced by what I think was an erroneous view of the law; he held that the topmost story of a building must necessarily mean a room inclosed by four vertical walls, and that as a consequence rooms built in the roof could not be considered as forming a story. It seems to me, however, that the surveyors were justified in deciding that the rooms in the present case are a story, and must be taken into account in calculating the height and necessary thickness of the party wall. The original award was therefore correct and ought to be restored, and the judgment of the City of London Court must be reversed.

GRANTHAM, J. I am entirely of the same opinion, and agree that the learned commissioner was wrong in assuming, as he clearly did, that a story must be a room or rooms inclosed within four vertical walls. The elaborate provisions of this statute seem to have been framed in expectation of great developments in the mode of building rooms, and it would be most unfortunate if such rooms as these were excluded from the important regulations of the schedule.

*Appeal allowed.*

Solicitors for plaintiff: *Munns & Longden.*

Solicitors for defendant: *Fraser & Christian.*

W. J. B.

1890
*April* 29;
*May* 2.

[IN THE COURT OF APPEAL.]

GUARDIANS OF MITFORD AND LAUNDITCH UNION, APPELLANTS; GUARDIANS OF WAYLAND UNION, RESPONDENTS.

*Poor Law—Settlement—Removal—Pauper aged Sixteen—Residence with Father—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35—9 & 10 *Vict. c.* 66, *ss.* 1, 3—11 & 12 *Vict. c.* 111, *s.* 1.

Notwithstanding s. 35 of the Divided Parishes Act, 1876, a child over sixteen, who is residing with its parent as part of the family, and who has no other settlement than the settlement derived from the parent at the time when it attained sixteen, is not removeable to its place of settlement if the parent is not removeable.

A child, after living in the appellant union with its father, who had acquired a settlement by residence there, removed with him into the respondent union, and while residing there with him as part of his family attained the age of sixteen and became chargeable. An order was made for the removal of the child to the appellant union. At the date of this order the father had resided for more than a year in the respondent union, and had thereby become irremoveable:—

*Held*, that, notwithstanding s. 35 of the Divided Parishes Act, 1876, s. 1 of the Act 11 & 12 Vict. c. 111, applied, and, the father not being removeable, the child was not removeable.

Decision of the Queen's Bench Division (24 Q. B. D. 122) affirmed.

APPEAL against the judgment of a Divisional Court (Lord Coleridge, C.J., and Mathew, J.) (1), affirming an order of Quarter Sessions, quashing an order for the removal of Jane Neville, a pauper, from the Wayland Union (called throughout this report "the respondent union"), to the Mitford and Launditch Union (called throughout this report "the appellant union").

The following facts appeared in the case stated by Quarter Sessions:—

The pauper was the legitimate daughter of John Neville, and was born February 29, 1872. John Neville resided in the parish of Shipdham, in the Mitford Union, from July, 1874, to October, 1887, without break and without relief, and thereby acquired a settlement by residence in Shipdham. On October 11, 1887, he removed to the parish of Hockham, in the Wayland Union, in which parish he had since resided, and was residing when the

(1) 24 Q. B. D. 122.

case was stated. On August 13, 1888, the daughter became chargeable to the Wayland Union, in consequence of sickness producing permanent disability. She was then over sixteen years of age. The relief given was given to her in her own name. Up to the time of her becoming chargeable she had always resided, and was when the case was stated residing, with her father as part of his family. The order of removal was made on October 24, 1888. At that date the father had resided in the parish of Hockham for twelve months in such manner as to render him irremoveable from the Wayland Union.

The Sessions held that the pauper, being unemancipated, was a child within the meaning of s. 1 of 11 & 12 Vict. c. 111; that she had no other settlement than that of her father with whom she resided; that she was therefore irremoveable, and that the order for her removal must be quashed.

The Divisional Court affirmed this decision

The respondent union appealed.

*H. D. Greene, Q.C.*, and *J. A. Thorne*, for the respondent union. The pauper became emancipated at the age of sixteen by virtue of the Divided Parishes Act (39 & 40 Vict. c. 61, s. 35); *Reigate Union* v. *Croydon Union* (1); and is, therefore, removeable to her place of settlement. The effect of the statutes, 14 Charles 2, c. 12, and 35 Geo. 3, c. 101, was, generally speaking, to make all persons becoming chargeable removeable to the parish of their settlement. Certain restrictions were subsequently imposed on this unlimited power of removal; but under the old law every one was removeable to his place of settlement, except unemancipated children forming part of the parent's family. By 9 & 10 Vict. c. 66, s. 1, it was provided that no person should be removeable from any parish in which he had resided for five years. The proviso to that section (2) was repealed by s. 1 of 11 & 12 Vict.

(1) 14 App. Cas. 465.

(2) 9 & 10 Vict. c. 66, s 1: "From and after the passing of this Act no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant. . . . Provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and

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c. 111, and another was substituted for it. The substituted proviso appears to contemplate a case where the head of a family has become chargeable and is being removed and there are unemancipated children;—not the case of the removal of an isolated member of the family, who is emancipated and has received relief on his or her own account. Taken in conjunction with s. 3 of 9 & 10 Vict. c. 66, the effect seems to be that, if the head of a family becomes chargeable, then the unemancipated children are to be removeable or not, according as he or she is (see *Reg.* v. *St. Anne, Blackfriars* (1); *Reg.* v. *St. Mary Arches, Exeter* (2); *Reg.* v. *St. Olave's* (3)); and that children under sixteen, whether they have an independent settlement or not, as they might have had under the law before the Divided Parishes Act, are not to be separated from their parents. Neither of these provisions as to children applies to the case of an emancipated child over sixteen, who has a settlement independent of its parent in its own right, as is the case with a child over sixteen under the Divided Parishes Act. Under the old law a child who acquired a settlement in its own right became ipso facto emancipated, and would then be re-

shall not be removeable when he or she is not removeable."

Sect. 3: "No child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child, from such parish, in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish."

11 & 12 Vict. c. 111, s. 1, repealed the proviso to s. 1 of 9 & 10 Vict. c. 66, and instead thereof enacted: "Provided always, that whenever any person should" (sic) "have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable, notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

By 39 & 40 Vict. c. 61, s. 35: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another."

(1) 22 L. J. (M.C.) 137.

(2) 31 L. J. (M.C.) 77.

(3) Law Rep. 9 Q. B. 38.

moveable to that settlement: *Rex* v. *Wilmington* (1); *Rex* v. *Much Cowarne* (2). By 24 & 25 Vict. c. 55, the period of residence required for the acquisition of the status of irremoveability was reduced to three years; and by 28 & 29 Vict. c. 79, it was ultimately reduced to one year; but the rest of the provisions remained unaltered. Now, by s. 35 of the Divided Parishes Act, a child on attaining sixteen becomes emancipated, and has a settlement in its own right independently of the father. The logical effect of the decision of the Divisional Court is, that the term "child" in the proviso to 9 & 10 Vict. c. 66, s. 1, applies to a person of any age who has a father or widowed mother living, though not residing with the parent. This is an absurd result, which cannot have been intended. Under the old law it was always considered that, when a person had acquired a settlement for himself, he had thereby removed himself from parental control for the purposes of the poor law: *Rex* v. *Bleasby* (3); *Rex* v. *New-Forrest.* (4)

[LOPES, L.J., referred to *Rex* v. *Roach.* (5)]

In *Highworth Union* v. *Westbury-on-Severn Union* (6) it was held by this Court that the effect of s. 35 of the Divided Parishes Act is, that every child on attaining sixteen is for the purposes of settlement emancipated and capable of acquiring a settlement for itself, and the House of Lords, in *Reigate Union* v. *Croydon Union* (7), agreed with this view. It is conceded that the pauper in the present case would have been irremoveable but for s. 35 of the Divided Parishes Act; but that section gives to a child, on attaining sixteen, a substantive and independent settlement of its own. It gives the child the capacity of acquiring the status of irremoveability for itself, instead of being dependent on the status of the parent. The proviso to s. 1 of 9 & 10 Vict. c. 66, was intended to deal only with unemancipated children living with their parent, and having only a derivative settlement; it cannot apply to an emancipated child who has an independent settlement of her own. Otherwise, "child" must be read as equivalent to "person."

(1) 5 B. & Ald. 525.
(2) 2 B. & Ald. 861.
(3) 3 B. & Ald. 377.
(4) 5 T. R. 478.
(5) 6 T. R. 247.
(6) 20 Q. B. D. 597, 604.
(7) 14 App. Cas. 465, 489, 491.

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GUARDIANS OF MITFORD AND LAUNDITCH UNION v. GUARDIANS OF WAYLAND UNION.

*Lumley Smith, Q.C.*, and *Poyser*, for the appellant union. It is clear that, at the time when the order of removal was made, the father was irremoveable. Independently of the Divided Parishes Act, that status was shared by the daughter, because she was residing with her father. That was the effect of the proviso to s. 1 of 9 & 10 Vict. c. 66. That proviso was not limited to children under sixteen; it applied to all children, whether under or over sixteen, who were living with their parent as part of the parent's family: *Reg.* v. *St. Mary Arches, Exeter.* (1) There the "child" was thirty years old. But the proviso did not apply, for instance, to a married son who was living away from his father. In *Reg.* v. *St. Olave's* (2) it was held that the test of irremoveability of a child was, whether the parent was irremoveable. The object of the proviso was, to prevent the separation of parent and children. That was the policy of the legislature, and it must be taken into account in considering the effect of s. 35 of the Divided Parishes Act. That section does not expressly repeal or alter the proviso; the question is, whether it has done so by inference or implication. What is the meaning of the words in the proviso, "having no other settlement than his or her own"? As the law then stood, those words must have included derivative settlements. Why should they not include a child who has an independent settlement of its own in the same place as the parent?

[FRY, L.J. The difficulty is that the child might have a fixed settlement, while the parent had a fluctuating one.]

At any rate, a father who was irremoveable carried with him all the members of his family who had not acquired independent settlements of their own. Sect. 35 of the Divided Parishes Act has not altered this in the case of children who have not, after attaining sixteen, acquired a new and independent settlement. The settlement of the father, which the child on attaining sixteen takes as its own settlement, is still "no other settlement than his own"—that is, the father's. It is only for the purposes of settlement that the child is to be treated as emancipated at sixteen. In *Reigate Union* v. *Croydon Union* (3) Lord Watson

(1) 31 L. J. (M.C.) 77. (2) Law Rep. 9 Q. B. 38.
(3) 14 App. Cas. 465.

said (at p. 484) that "the effect of s. 35 is to fix absolutely the age of sixteen as the period of emancipation, in all questions regarding the settlement of legitimate children, as had already been done in the case of illegitimate children.

*Greene, Q.C.*, in reply. The cases in which a person above twenty-one has been spoken of as a "child" were cases of unemancipated persons—persons who had not acquired independent settlements.

LORD ESHER, M.R. In this case a girl over sixteen was living with her father in the parish of Hockham in the Wayland Union, living with him as a member of his family. His settlement at the moment when she became sixteen was not in that parish, but in the parish of Shipdham, in the Mitford Union. But, although his settlement was in the parish of Shipdham, he had, at the date of the order for removal of the daughter, become irremoveable from the Wayland Union. He being thus irremoveable, his daughter, who was over sixteen and who was living with him as part of his family, was relieved, and thereupon became chargeable to the Wayland Union. The guardians of that union insist that, though the father is not removeable, they have a right to call upon the justices to order the removal of the daughter to the Mitford Union, in which her father was settled when she became sixteen, because, they say, that became her settlement at the moment when she attained sixteen, and was still her settlement at the date of the order of removal. It cannot be denied that her settlement is in the Mitford Union, to which they desire her to be removed, or that the father cannot be removed from the Wayland Union. It is said that the girl cannot be removed, although her settlement is in another union, because her removal would separate her from her father, and so break up the close relation which existed between them. The question which we have to decide is, not what is the settlement of the girl, but, assuming her settlement to be in the union to which it is desired to remove her, can she under the circumstances be removed?

Now, the answer to that question must, as it seems to me, depend, first, upon the construction of the proviso contained in

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s. 1 of the Act 11 & 12 Vict. c. 111; then upon the construction of s. 35 of the Divided Parishes Act; and lastly, upon the application of the one to the other. What then is the right construction of the proviso in s. 1 of the Act 11 & 12 Vict c. 111? There can be no doubt as to the history of that proviso. Before the passing of the Act 9 & 10 Vict. c. 66, the law of England stood thus: When a parent and his child had different settlements, and they both became chargeable in the same place and both had to be removed, the parent could be removed to one place and the child to another, and thus the family was divided and broken up. That appeared to the legislature to be a harsh and cruel law, and I agree with them in so thinking. I think that the proviso was a benevolent and humane enactment, and that its object was to prevent in these cases of misfortune the separation of families, so long as the family continued to be one family living together. If the family were living together as one under the superintendence of its head, and the misfortune of requiring parish relief should happen either to the parents or to the children, they were not to be separated from each other. Remembering the object with which the proviso was passed, I cannot doubt that it applies to the case of a person who has a wife or children living with him as part of his family. When you consider the object of the legislature, it is a necessary implication that you should read the proviso thus: "Whenever any person shall have a wife or children *living with him as part of his family*," the words in italics being understood. That being so, the next point to be considered is, what is the meaning of the following words: "Having no other settlement than his or her own." In order to construe those words, we must look at the different persons to whom they are applied. Who are they? "Wife or children," and no other—wife or children still being part of the father's or mother's family. That being so, I have no hesitation in saying that the meaning of the words, "Having no other settlement than his or her own" is, "having no other settlement than the settlement derived from him or her." The proviso is to apply so long as that state of things lasts. It does not, therefore, apply when the wife or child has another settlement than that derived from the husband or father or

mother, but, so long as the only settlement of the wife or the child or children is that derived from the husband or the father or the mother—that is, the wife from her husband, or the child from its father or mother—they are not to be separated.

That being the construction of the statute 11 & 12 Vict. c. 111, s. 1, we have now to consider what is the true construction of s. 35 of the Divided Parishes Act. The great difficulty which had been felt was in the proof, and in the expense of the proof, of derivative settlements, and the first part of s. 35 was intended to deal with that. It says: "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise," except in certain cases. Derivative settlements were well known before this; but by this section they are abolished, except in certain cases in which they are retained. "Except in the case of a wife from her husband, and in the case of a child under the age of sixteen" These are to be the exceptions in which there is still to be a derivative settlement. Then, what is to be the consequence of taking away the derivative settlement from a child under the age of sixteen? "Which child shall take the settlement of its father, or" (if there is no father living) "of its widowed mother, as the case may be, up to that age"—that is, up to the age of sixteen and at that age, when the clock strikes, the child is to have the settlement derived from either its father or its widowed mother. Then what is to happen after sixteen? "And shall retain the settlement so taken until it shall acquire another."

Two settlements are there spoken of—the one which is to be "retained," and the other which is to be "acquired." That which is to be "acquired" is not a derivative settlement; it is to be "acquired" by the child itself.

What is the settlement which is to be "retained," according to the ordinary meaning of those words? The child is to "retain" the settlement which it had the moment before the hour struck which made it sixteen. What was that? A derivative settlement. What is it which is to be retained? I think the natural meaning of the words is this—that the settlement which is to be retained is the derivative settlement which existed at the moment when the child attained sixteen, and that, in my opinion, is the meaning of s. 35.

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Then, what is the application of these two readings of these two sections to the particular case? This girl, although she was sixteen, had a derivative settlement; she was living with her father as part of his family. She, therefore, comes within the first words of the proviso in s. 1 of 11 & 12 Vict. c. 111. The father is a person "having a child living with him as part of his family." What is the condition of that child which is part of his family? She is a child having a derivative settlement. Then, if you read the words "having no other settlement than his own" as meaning, "having no other settlement than the settlement derived from the father," the condition which is to take the case out of the enactment does not exist, and, therefore, it is within the enactment that the child shall not be separated from the father.

Under these circumstances, therefore, because the father was irremoveable, because the child was living with the father as part of his family, and because the only settlement which the child had was the settlement derived from the father, the proviso, which is in no way repealed or affected in its construction by s. 35 of the Divided Parishes Act, prevents the separation of the father and the child, and the child's privilege of not being separated from her father exists, notwithstanding the application of s. 35 of the Divided Parishes Act.

I think, therefore, that the decision of the Divisional Court was right, and that the appeal fails.

FRY, L.J. I am of the same opinion, and, as the case is one of very considerable importance, I will express my conclusions in my own words.

The Act 9 & 10 Vict. c. 66, had for its main object the prevention of the removal of any person who had resided for five years in a parish. That enactment was made subject to certain restrictions and provisions, amongst which was one contained in a proviso to s. 1 of the Act. That proviso was subsequently repealed, and another substituted for it, by the Act 11 & 12 Vict. c. 111.

I will not dwell upon the difference between the original proviso and that by which it was afterwards replaced, because it

is not easy to say precisely what the difference was. But, in my opinion, the proviso which is now in force, that contained in the Act 11 & 12 Vict. c. 111, s. 1, applies to the case of a husband or parent having a wife or children who are members of his family, and which wife or children has or have in fact a settlement derived from the husband or father. The words, no doubt, are general—"Whenever any person shall have a wife or children having no other settlement than his or their own." But the absurdity of applying the provision to every child of whatever age, wherever resident, and under whatever circumstances, is so great, that nearly thirty years ago a limited construction was placed on the words of the section. In *Reg.* v. *St. Mary Arches, Exeter* (1), which was decided in January, 1862, Cockburn, C.J., said (p. 80), "I think, although the first of these statements is obscure, and the second more obscure still, the effect is that a child or wife, so long as he or she continues a member of the parent's family, shall not acquire the status of irremoveability until after the death of the one or the other parent who was the head of the family, if that parent was removeable." The Lord Chief Justice, therefore, put upon the word "children" this limitation, that they were to be children who continued members of the parent's family. That appears to me to be a just and reasonable limitation, and it makes the proviso intelligible. The object of the legislature was to prevent the scattering and breaking up of families, which was a great hardship, and was opposed to the conception of a family in English law. That, in my opinion, is the scope and effect of the proviso.

Then we come to s. 35 of the Divided Parishes Act, and we have to consider what is its true meaning. It provides that "no person shall be deemed to have derived a settlement from any other person, except" (I omit the case of a wife) "in the case of a child under sixteen." Therefore, it is plain that a child under the age of sixteen is still to have a derivative settlement, "which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age." Pausing there, it is obvious to my mind that the old derivative settlement continues in force up to the age of sixteen, and that up to that

(1) 31 L. J. (M C.) 77.

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age the child's settlement varies as the settlement of its father or its widowed mother may vary; that it has no independent settlement until it reaches the age of sixteen. Then the section proceeds, "and shall retain the settlement so taken until it shall acquire another." Therefore, at the age of sixteen the child retains the particular settlement which it had derived from the parent; it retains the derived settlement, but it is no longer subject to change with the parent's settlement, as it had been before the age of sixteen. The child retains the derived settlement, whatever the parent may do, and retains it until the acquisition of another settlement by the child itself.

That, as it appears to me, is the true meaning of s. 35; and, reading s. 35 together with s. 1 of the Act 11 & 12 Vict. c. 111, it seems to me to follow, that the derivative settlement which is to be retained by the child after sixteen is the settlement which the parent had when it attained sixteen, and that that settlement is to be retained until the child has acquired one of its own. In other words, the child still has no other settlement than that of the parent, until it has acquired a settlement of its own after sixteen. Up to sixteen it has the old derivative settlement, and after sixteen, until the acquisition of a new one, it has still no other than the parent's settlement. For these reasons I agree with the judgment of the Divisional Court.

LOPES, L.J. It is clear that the pauper in question was improperly removed, unless the law as it previously existed has been altered by s. 35 of the Divided Parishes Act of 1876. It is, therefore, I think, material in the first place to consider what the effect of s. 35 is. One great object which the legislature had in view in passing that section no doubt was this—to prevent the enormous expense which was from time to time incurred by parishes in tracing remote derivative settlements.

Sect. 35 says, "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise," except in certain cases. All derivative settlements which go back further than the immediate parents are absolutely abolished. But derivative settlements are preserved, "in the case of a wife from her husband, and in the case of a child under

the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another." That leaves the law as it was up to the age of sixteen. Up to that age the child is to take the derivative settlement of the parent, and that settlement is to fluctuate with the parents' settlement. But directly the child attains the age of sixteen it is to take the then settlement of its father, or of its widowed mother, as its own settlement, and is to retain the settlement so taken until it shall acquire another. Therefore, immediately a child attains sixteen the settlement which it so takes at that time no longer fluctuates with the parent's settlement, but becomes the child's own settlement. The words are, "retain the settlement so taken." What does that mean? Surely it must mean, retain the derivative settlement—retain that settlement which it derived from its parent—until it acquires another.

Now, applying that construction to the present case, the result is, that this girl, having attained the age of sixteen, had then already taken the settlement of her father, and retained it, and was then retaining it, as her own settlement, and would retain it (but retain it as a derivative settlement) until she should acquire another.

Then we have to consider the effect of the proviso in s. 1 of 11 & 12 Vict. c. 111: "Provided always that whenever any person shall have a wife or children" (clearly thereby referring to derivative settlements) "having no other settlement than his or her own" (which I understand to mean "having no other settlement than a derivative settlement") "such wife and children" (and I understand that to mean such wife and children whilst living with the head of the family as a member or members of his family) "shall be removeable from any parish or place from which he or she shall be removeable notwithstanding any provisions of the said recited Act, and shall not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

If I have correctly interpreted s. 35 of the Divided Parishes Act, viz., that the pauper at the time when she became chargeable had the derivative settlement of her father, it appears to me

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that she comes strictly within this proviso, because she had then no other settlement than that derivative settlement, and she was then living with her father as part of his family.

In this way, as it seems to me, we can read the two statutes together. And it is to be observed that the Act 11 & 12 Vict. c. 111, has nothing whatever to do with settlements, but relates entirely to the irremoveability of paupers. We are, therefore, by this construction enabled to read the two statutes together, and to maintain that great principle which has been always upheld, viz., the prevention of the separation of families.

I think, therefore, that the decision of the Divisional Court was right, and that the appeal should be dismissed. But I am not quite certain whether the Divisional Court based their decision upon the same grounds as we have done.

*Appeal dismissed.*

Solicitors: *Whites & Co.; Harrison & Powell.*

W. L. C.

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*April* 25.

[IN THE COURT OF APPEAL.]

IN RE WALLIS. EX PARTE LICKORISH.

*Mortgage—Redemption—Mortgagee's Costs—Solicitor-Mortgagee—Profit Costs.*

A mortgagee who is a solicitor, and who in that capacity acts on his own behalf in proceedings relating to the mortgage debt or the mortgage security, cannot (in the absence of express contract) charge against the mortgagor, as part of his costs, charges, and expenses incurred as mortgagee, profit costs in respect of professional services so rendered, but will be limited to disbursements out of pocket.

*Selater* v. *Cottam* (5 W. R. 744; 3 Jur. (N.S.) 630); and *In re Roberts* (43 Ch. D. 52), approved.

APPEAL against an order made by one of the registrars in bankruptcy, limiting the amount of the costs to which the appellants were entitled as mortgagees of W. P. V. Wallis, against whom a receiving order had been made.

The appellants, who were solicitors, had made advances to the debtor, and on May 22, 1889, they recovered judgment against him for 273*l.* 9*s.* 2*d.*, the amount of their debt, with interest and

taxed costs. The debtor had deposited with them as security for the debt the certificates of some shares in a railway company, together with a blank transfer of the shares. The debt not having been paid, they presented a bankruptcy petition against the debtor, in which they valued their security at 120*l.*, and on this petition a receiving order was made. The debtor afterwards applied that the receiving order might be rescinded and the petition dismissed, and on January 20, 1890, the registrar made an order adjourning the further hearing of the application, and that the costs of the petitioning creditors of and incident to the bankruptcy proceedings, including the costs of the application to rescind, should be taxed by one of the taxing masters in bankruptcy, "and this Court doth request the said taxing master to tax all other costs and charges claimed by the petitioning creditors as against the debtor, or as against the securities held by them, and to refer back to this Court any legal principle involved and raised by either party in respect of these last-mentioned costs and charges."

The petitioning creditors carried in for taxation a bill of costs relating chiefly to some abortive executions which they had issued against the debtor to enforce their judgment. They had acted for themselves in the matter without the intervention of any other solicitor.

On February 20 an order was made rescinding the receiving order, the debtor having paid 450*l.* into Court.

On March 6, the application for the dismissal of the petition came again before the registrar, and he made an order that out of the sum of 450*l.* there should "be paid to the petitioning creditors the following sums, viz., petitioning creditors' debt and taxed costs of action, 273*l.* 9*s.* 2*d.*; bankruptcy costs, 81*l.* 18*s.*; secured creditors' costs out of pocket, 7*l.* 4*s.* 1*d.*; interest on judgment debt from petition, 8*l.* 2*s.* 6*d.*; and that all the items in secured creditors' costs (except such as are for out-of-pocket expenses) be disallowed." And it was further ordered that the petition should be dismissed, and that 79*l.* 6*s.* 3*d.* (the balance of the 450*l.*) should be paid out to the debtor.

From this order the appeal was brought.

By their notice of appeal the appellants asked that the order

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might be rescinded, "so far as it orders that all the items in the applicants' (the secured creditors) costs, except such as are for out-of-pocket expenses, be disallowed, and that the balance of the 450*l.* be paid out" to the debtor, "on the ground that the order improperly takes into consideration the fact that the applicants acted as their own solicitors, and accordingly confines their costs to out-of-pocket expenses," and that it might be declared that the debtor was liable to pay to the appellants "as mortgagees such costs in respect of the security held by them as would have been payable by him irrespective of the consideration that the mortgagees were themselves the solicitors," and that the taxed costs of the appellants on this footing might be paid out of the balance of 79*l.* 6*s.* 3*d.*

*Lane, Q.C.*, and *Maidlow*, for the appellants. The question is, whether a mortgagee who is himself a solicitor is entitled to charge against the security as part of the mortgagee's costs the same professional costs, i.e. profit costs, as he would have been entitled to charge if he had employed another solicitor to act for him. He cannot, of course, charge for such things as giving instructions to himself; but it is contended that he ought to be allowed, not only actual payments out of pocket, but also such profit costs as the ordinary solicitor's fee for suing out a writ of fi. fa., or the proper fee for correspondence. The registrar acted on the authority of the decision of Kay, J., in *In re Roberts* (1); but that decision is not binding on this Court. In the more recent case, *Field* v. *Hopkins* (2), Kay, J., adhered to and explained his decisions in *In re Roberts* (1). In *Solater* v. *Cottam* (3), Kindersley, V.C., held, that a mortgagee, who had acted as his own solicitor in a suit in defence of his title to the mortgaged property, could not be allowed, as against a second mortgagee, any costs except costs out of pocket; but in *Price* v. *McBeth* (4), Stuart, V.C., would not decide whether a solicitor, who acted for himself as mortgagee in a suit for redemption, was, as a matter of course, entitled to have his ordinary profit costs of the suit. But the Vice-Chancellor declined to disallow such costs in that

(1) 43 Ch. D. 52.
(2) 59 L. J. (Ch.) 174.
(3) 5 W. R. 744; 3 Jur. (N.S.) 630.
(4) 33 L. J. (Ch.) 460.

case, because they had not been objected to at the proper time. The decision of this Court in *London Scottish Benefit Society* v. *Chorley* (1) is really inconsistent with *In re Roberts* (2) and *Sclater* v *Cottam* (3). There it was held that a solicitor, who defended an action in person and obtained judgment, was entitled upon taxation to the same costs as if he had employed another solicitor to act for him, except in respect of items which the fact of his acting directly rendered unnecessary. Originally any attempt to give a mortgagee a collateral advantage was treated as contrary to the usury laws, and, after the repeal of those laws, Courts of Equity still extended the same protection to a borrower, on the ground that he was a needy man. The principle applicable to the redemption of a mortgage is, that the mortgagee is entitled to be indemnified by the mortgagor against all reasonable costs and expenses incurred by him in relation to the mortgage debt or the mortgage security. This includes the costs of litigation, and is not limited to the costs of a redemption action: *National Provincial Bank of England* v. *Games.* (4) In *In re Donaldson* (5), Bacon, V.C., held that, where one of a body of mortgagees was a solicitor, and as such acted in enforcing the mortgage security, he was entitled to charge profit costs against the mortgagor. As a matter of principle there can be no reason why a mortgagor should be relieved from the payment of costs, which would have been chargeable against the security if the mortgagee had employed a solicitor to act for him, simply because he, being a solicitor, chooses to act for himself. The principle of the decision in *London Scottish Benefit Society* v. *Chorley* (1) was that costs which can be taxed are reducible to a fixed amount, and are not like a charge for loss of time. They are not, therefore, open to the objection that a collateral advantage is given to the mortgagee. The principle of *Chambers* v. *Goldwin* (6), on which the decision in *Sclater* v. *Cottam* (3) was really founded, does not, therefore, apply. There is no distinction between costs of litigation and other costs: *Cradock* v. *Piper* (7); *Broughton* v.

(1) 13 Q. B. D. 872.
(2) 43 Ch. D. 52.
(3) 5 W. R. 744; 3 Jur. (N.S.) 630.
(4) 31 Ch. D. 582.
(5) 27 Ch. D. 544.
(6) 9 Ves. 254, 271.
(7) 1 Mac. & G. 664.

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*Broughton.* (1) The decision in *In re Roberts* (2) did not turn upon the relation between mortgagor and mortgagee.

The respondent appeared in person, but was not called upon.

LORD ESHER, M.R. The argument really comes to this, that *London Scottish Benefit Society* v. *Chorley* (3) has inferentially overruled *Sclater* v. *Cottam* (4) and several other cases: it certainly has not expressly overruled those cases, and I decline to hold that it has overruled cases with which the judges did not profess to be dealing, there being no necessary implication that they intended to do so.

It has been settled for many years that the rights of mortgagor and mortgagee inter se depend upon the contract between them, and that, when there is no express contract, but only the ordinary contract which arises out of the relation of mortgagor and mortgagee, the mortgagee cannot charge the mortgagor with remuneration for his own personal services in relation to the mortgage debt or the mortgage security. This rule is not limited to solicitors, but it extends to any mortgagee who is capable of giving and who does give his own personal services in relation to the mortgage debt or security. This rule has been laid down with reference to the contract which arises simply out of the relation between mortgagor and mortgagee. The decision in *Sclater* v. *Cottam* (4) was given more than thirty years ago, and must have become well known to solicitors. What is the rule upon which this Court always acts under such circumstances? When a decision has stood for so many years, this Court always considers that subsequent contracts have been entered into subject to it, and, even if the Court would not have come to the same conclusion in the first instance, it will not overrule a decision which has been acted upon for so long. But I do not differ from that decision; on the contrary, I think it is consistent with every principle of justice that a man should not be entitled to charge for costs and expenses when he has not incurred any. There are also the two recent decisions of Kay, J., and I agree that we cannot allow this appeal without overruling

(1) 5 D. M. & G. 160.
(2) 43 Ch. D. 52.
(3) 13 Q. B. D. 872.
(4) 5 W. R 744; 3 Jur. (N.S.) 630.

them also. In *London Scottish Benefit Society* v. *Chorley* (1), the Court did not hold that a solicitor who had conducted his own litigation was entitled to the same costs as if he had employed another solicitor to act for him. The Court took a middle course, and held that the solicitor was entitled to less costs than if he had employed another solicitor, but to more costs than if he had been an ordinary litigant acting for himself. But that decision applied only to the costs of litigation, and had nothing to do with the relations between mortgagor and mortgagee.

The question, what costs can be charged by a mortgagee against his mortgagor under the ordinary contract which arises out of that relation, was decided, and I think rightly decided, by Kindersley, V.C., in *Sclater* v. *Cottam* (2), and also by Kay, J., in *In re Roberts*. (3) The registrar has followed those decisions, and the appeal must be dismissed.

FRY, L.J. The case turns upon the effect of the ordinary contract which arises out of the relation between a mortgagor and his mortgagee. It is well settled that under that contract the mortgagor, if he desires to redeem the mortgaged property, must pay (1) the principal debt; (2) the interest thereon; (3) all proper costs, charges, and expenses incurred by the mortgagee in relation to the mortgaged debt or the mortgage security; (4) the costs of litigation properly undertaken by the mortgagee in reference to the mortgage debt or the security; (5) the mortgagee's costs of the redemption action. We are not now concerned with the 4th and 5th heads, for there has been no litigation in the present case; but the question which arises relates to the costs, charges, and expenses properly incurred by the mortgagees. So far as I am aware, no case is to be found in which a mortgagee has been allowed to charge against the mortgagor, as part of his costs, charges, and expenses properly incurred, remuneration for work done or labour undertaken by himself personally. On the contrary, the Court has often said, "Though you may recover, as part of your costs, charges, and expenses, payments which you have made for work

(1) 13 Q. B. D. 872. (2) 5 W. R. 744; 3 Jur. (N.S.) 630.
(3) 43 Ch. D. 52.

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done in relation to the mortgage debt or the mortgage security, yet, if you choose to do the work yourself, you cannot charge for it." For instance, if a mortgagee was a surveyor, he could not charge for surveyor's work done by himself, though he could charge for the same work if he had employed another surveyor to do it. In the same way, a mortgagee who had entered into possession of the mortgaged property would be entitled to charge the commission of a receiver for receiving the rents; but, if he chose to collect the rents himself, he could not make any charge for so doing. In my judgment, this rule is well ascertained, and it was not acted upon for the first time by Kindersley, V.C., in *Sclater* v. *Cottam*. (1) I do not think that any exception to the rule was introduced in *London Scottish Benefit Society* v. *Chorley*. (2)

LOPES, L.J. The case turns upon this—What are the ordinary terms of redemption of a mortgage? Those terms are, the payment by the mortgagor of principal, interest, and costs—that is, "costs" in the ordinary sense of the word—and not remuneration for services rendered by the mortgagee himself. In the present case the mortgagees, who are solicitors, have done professional work themselves, and there are not, therefore, in respect of that work, any "costs" which they can charge against the mortgagor, beyond expenses out of pocket which the registrar has allowed them. The case falls within *Sclater* v. *Cottam* (1) and *In re Roberts* (3), which, I think, were just and wholesome decisions.

*Appeal dismissed.*

Solicitors: *Lickorish & Bellord; W. Rogers.*

(1) 5 W. R. 744; 3 Jur. (N.S.) 630. (2) 13 Q. B. D. 872.
(3) 43 Ch. D. 52.

W. L. C.

[IN THE COURT OF APPEAL.]

1890
*April* 29;
*May* 19.

MITCHELL *v.* SIMPSON.

*Sheriff—Sheriffs Act,* 1887 (50 & 51 *Vict. c.* 55), *s.* 14 (1)—*Attachment for Debt—Debtor taken to Prison within Twenty-four Hours of Arrest—Order for Commitment under Debtors Act,* 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5.

A judgment debtor arrested by virtue of an order of commitment under s. 5 of the Debtors Act, 1869, is not a person arrested by virtue of an "attachment for debt" within the meaning of s. 14 (1) of the Sheriffs Act, 1887. Such debtor may, therefore, notwithstanding that enactment, be taken to prison within twenty-four hours of his arrest.

APPEAL from the judgment of the Queen's Bench Division. (1)

The action was against the high bailiff of the Salford Hundred Court of Record for a breach of the Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 14 (1) (*c*), in taking the plaintiff to prison within twenty-four hours of his arrest. (2)

The trial took place before Manisty, J., and a jury, when evidence of the following facts was given on behalf of the plaintiff:—

A judgment was recovered in the Salford Hundred Court of Record against the plaintiff for a sum of 31*l.* 1*s.* 4*d.*; and, upon default by him in payment of the same, and proof of his having had sufficient means to pay, an order was made by the learned judge of that Court under s. 5 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), that the plaintiff should be imprisoned for twenty-one days, or until he should pay the said sum. By virtue of that order the defendant caused the plaintiff to be arrested in London upon the evening of June 18, 1888, and taken to a police station. The plaintiff requested to be taken to an hotel for the night, but his request was refused, and he was kept for about

(1) 23 Q. B. D. 373.

(2) 50 & 51 Vict. c. 55, s. 14 (1): "Where an officer being a sheriff, undersheriff, bailiff, serjeant at mace, or other officer whatsoever, arrests or has in custody any person by virtue of any action, writ, or attachment for debt, such officer shall not

"(*c*) take such person to any prison within twenty-four hours of the time of his arrest, unless such person refuses to be carried to some safe and convenient dwelling-house of his own nomination, not being the private dwelling-house of such person, and being within the borough or town where such person was arrested . . . ."

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four hours at the police station and then taken to St. Pancras Railway Station, whence he was conveyed by train to Manchester and there lodged in gaol early the next morning. It was admitted for the defendant that, if s. 14 (1) of the Sheriffs Act, 1887, was applicable to the plaintiff's arrest, there had been an infringement of its provisions for which the defendant would be responsible; but it was contended that the section did not apply. The learned judge held that the order of commitment was not an attachment for debt within s. 14 (1), and he accordingly non-suited the plaintiff upon the ground that the section was inapplicable.

The plaintiff moved the Divisional Court to set aside the non-suit and for a new trial; but his application was refused.

April 29. *Channell, Q.C.*, and *J. D. O'Flynn*, for the plaintiff. The terms of s. 14 (1) of the Sheriffs Act, 1887, primâ facie include a commitment under s. 5 of the Debtors Act, 1869, for such a commitment is an attachment for debt. It is not a commitment for contempt, but process for compelling payment of the debt: *In re Ryley.* (1) No doubt the Sheriffs Act is a consolidation Act, and the terms of the section are in the main similar to those of the 32 Geo. 2, c. 28, s. 1, which was held to apply only to arrest on mesne process. But there is a difference in the language of the two enactments, for the words "for debt" are inserted after the word "attachment" in the Act of 1887, which was not so in the earlier enactment, and, although it must be admitted that the attachment referred to in the Act of Geo. 2 was by necessary implication an attachment for debt, an inference arises from the mere fact of the alteration of the language that the legislature had some subject-matter in view when they so altered it. Mesne process was abolished by 1 & 2 Vict. c. 110, s. 1, which has since been repealed by 32 & 33 Vict. c. 83, but for which the similar provisions of s. 6 of the Debtors Act, 1869, are substituted. Therefore the words in the Sheriffs Act cannot have the same meaning as in 32 Geo. 2, c. 28. Imprisonment for debt by way of execution is abolished by the Debtors Act, 1869, except so far as it is retained by that Act. Therefore there

(1) 15 Q. B. D. 329.

is no subject-matter to which the words "attachment for debt" can be applied, unless they apply to commitments under s. 5 of the Debtors Act, 1869. The words must, if possible, receive some meaning. The intention of the legislature appears to have been that a person, who might possibly, if he had an opportunity, be able to procure money to discharge the debt, should have an interval of twenty-four hours before being actually taken to prison within which to endeavour to procure the money.

[LORD ESHER, M.R. A debtor cannot be imprisoned under s. 5 of the Debtors Act, 1869, until he has been taken before the judge and ordered to pay the debt, and, such order having been disobeyed, there has been a subsequent order for commitment. Why should a further indulgence for twenty-four hours be necessary?]

[They also cited *Hume* v. *Druyff.* (1)]

*Ambrose, Q.C.*, and *A. J. David*, for the defendant. A commitment under s. 5 of the Debtors Act, 1869, is not an "attachment for debt." It has always been recognised as a thing sui generis, and altogether distinct from process by way of execution, with a name of its own. See Order XLII., rr. 3, 25; Order XLIV., r. 1, and the form of writ of attachment given in Appendix H. By rule 361, Bankruptcy Rules, 1886, the county court rules for the time being in force as to the committal of judgment debtors apply to all Courts. The form of committal order given by the County Court Rules, 1889 (Form 55), requires the bailiff to take the judgment debtor and deliver him to the governor of the prison, who is to keep him for so many days from the arrest. The order under the 5th section of the Debtors Act is in the nature of a committal for contempt in disobeying the order of the Court rather than of process for debt: *Marris* v. *Ingram* (2); *In re Gent* (3); *In re Freston* (4); *Holroyde* v. *Garnett* (5); *Middleton* v. *Chichester* (6); *Ex parte Dakins.* (7) The Sheriffs Act, 1887, is merely a consolidation Act; and s. 14 (1) is substantially merely a reproduction of the provisions of 32 Geo. 2, c. 28, s. 1. It is well settled that

(1) Law Rep. 8 Ex. 214.
(2) 13 Ch. D. 338.
(3) 40 Ch. D. 190.
(4) 11 Q. B. D. 545.
(5) 20 Ch. D. 532.
(6) Law Rep. 6 Ch. 152.
(7) 16 C. B. 77.

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the provisions of that Act only applied to arrest on mesne process: *Evans v. Atkins.* (1) Sect. 14 (1) must receive a similar construction. It is the practice in a consolidation Act to re-enact every portion of the Acts consolidated which can have any possible force. Arrest on mesne process is not entirely abolished. It would still apply in the case of crown debts, for the crown is not named in the enactment of 1 & 2 Vict. c. 110, by which it is said mesne process was abolished, or in s. 6 of the Debtors Act, 1869. Moreover, arrest on mesne process was preserved under 1 & 2 Vict. c. 110, in cases under s. 3, where a debtor was believed to be about to leave the kingdom; and a similar power to arrest still exists under s. 6 of the Debtors Act, 1869. Sect. 29 of the Sheriffs Act, 1887, assumes that arrest on mesne process still exists in some cases. Imprisonment by way of final process still exists in the case of default in payment of a penalty mentioned in s. 4, clause 1, of the Debtors Act, 1869. Sect. 16 of the Sheriffs Act, 1887, shews that s. 14 (1) only applies to mesne process, for in that section, where the legislature are dealing with imprisonment by way of final process, they use quite different language from that used in s. 14 (1). The object of the provision of 32 Geo. 2, c. 28, s. 1, of which s. 14 (1) of the Sheriffs Act, 1887, is a reproduction, was to give the person arrested an opportunity of procuring bail. The machinery is altogether inappropriate to a commitment under the Debtors Act, 1869.

*Channell, Q.C.*, in reply. The Crown is mentioned in 1 & 2 Vict. c. 110, s. 103. The reservation of the rights of the Crown in that section by implication shews that the Act applies to the rights of the Crown, except so far as such reservation extends. Therefore arrest on mesne process cannot exist in the case of Crown debts. The cases in which s. 4 of the Debtors Act, 1869, preserves imprisonment for default in payment of sums of money, which are not debts, properly so called, cannot afford a subject-matter for the operation of s. 14 (1) of the Sheriffs Act, 1887, which speaks of attachment for debt. The case of a defendant about to abscond from England to avoid payment of his debts is one to which the provision of s. 14 (1) of the Sheriffs Act is still less appropriate than it is to that of a person committed

(1) 4 T. R. 555.

under the Debtors Act, 1869. The arrest in such a case under s. 6 of the Debtors Act is not arrest on mesne process. So far from its being the case that the commitment under s. 5 of the Debtors Act, 1869, has always been treated as generically different from imprisonment by way of execution, the 5th section of the Act itself provides that every order of committal under the section by any superior court shall be issued, obeyed, and executed in the like manner as a writ of ca. sa.

*Cur. adv. vult.*

May 19. The following judgments were delivered:—

LORD ESHER, M.R. In this case the plaintiff sues the high bailiff of the Salford Hundred Court, because, when he was arrested under an order of commitment made by the judge of that Court under the Debtors Act, 1869, the defendant did not take him to some place—it was an hotel, I think, to which he requested to be taken—to be kept there for twenty-four hours, before being taken to prison under the commitment. The plaintiff was a person who had an order made against him under the 5th section of the Debtors Act, 1869—that is to say, he was a person who had been committed to prison on the ground that he had the means of paying a debt found to be due from him by the judgment of the Court, but wilfully refused and neglected to pay such debt. Being in that position, he brings this action against the bailiff for breach of the provisions of s. 14 (1) of the Sheriffs Act, 1887, because the defendant did not take him to an hotel as he requested, and keep him there for twenty-four hours. If the plaintiff had been taken to the hotel, he would have had to pay for his board and lodging himself. In other words, the suggestion is that a person who, having money to pay his debt, contumaciously refuses to do so, and is therefore committed, is to be taken to an hotel to enjoy himself, and spend his money there for twenty-four hours before being taken to gaol under the commitment. A more unsubstantial cause of action could hardly be conceived; for I should think that no jury in such a case would give more than a farthing damages, even if the defendant were technically wrong. There is no suggestion that the defendant really did anything harsh in this case. If the contention for the plaintiff were well founded,

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the result would be somewhat formidable. There are numbers of these orders of commitment made, especially in the county courts, against people who have the means to pay their debts, but are unwilling to do so. If in such cases the sheriff or other officer is bound to comply with s. 14 (1) (c) of the Sheriffs Act, 1887, as he is bound not to lose sight of the prisoner and to keep him in custody, there must be an officer in attendance on each of these persons during the twenty-four hours after the arrest. The inconvenience resulting would be enormous; and if our decision were in the plaintiff's favour, it is obvious that the intervention of the legislature would be immediately necessary. Nevertheless, if the plaintiff's contention is right, we must give effect to it.

The question is, whether an arrest upon a commitment order under the 5th section of the Debtors Act, 1869, is within s. 14 (1) of the Sheriffs Act, 1887. Such an order is an order that the person against whom it is made shall be imprisoned, not merely because he has not paid or cannot pay a debt, but for an offence; for non-payment of a judgment debt which he had the means of paying; for a contumacious refusal to obey the order of the Court after ample warning and opportunity. The Sheriffs Act, 1887, is a consolidation Act, and the provision in question follows very nearly in its terms those of 32 Geo. 2, c. 28, s. 1. What were the cases in contemplation of which that enactment was passed? They were cases, not where a judgment debtor had been committed by the order of a judge for contumaciously refusing to pay the judgment debt, though he had the means of payment, but where a person was arrested at the commencement of the action, and really at the mere will of the person suing him. The extortion by bailiffs and other abuses which existed under the system of arrest on mesne process then prevailing are matters of common knowledge. It was to prevent such abuses that the Act of 32 Geo. 2, c. 28, was passed. The preamble stated that "many persons suffer by the oppression of inferior officers in the execution of process for debt"—that is, process issued at the mere will of the person alleging that a debt was due to him —"and the exaction of gaolers to whom such debtors are committed"; and it was provided by the 1st section, among other

things, that the sheriff should not carry any person by him arrested, or being in his custody by virtue or colour of any action, writ, process, or attachment, to any gaol or prison within four and twenty hours from the time of such arrest, unless such person should refuse to be carried to some safe and convenient dwelling-house of his own nomination or appointment, &c. It is said that, because in the 14th section of the Act of 1887 the words "for debt" are inserted after the word "attachment," it is not merely a repetition of the provision of the 32 Geo. 2, c. 28; but when we look at the preamble to that Act, which speaks of the execution of process for debt, it is obvious that the attachment mentioned in the 1st section must by necessary implication mean attachment for debt. So that the provisions of the two statutes are really exactly the same. Then is the commitment to prison by a judge under the 5th section of the Debtors Act, 1869, the same sort of thing as the attachment for debt with reference to which the Act of Geo. 2 was passed? In the one case the arrest is by order of a judge, made not merely because a debt is due, but because of a contumacious refusal to pay a judgment debt; in the other it was before judgment, and really at the will of the person suing out process. In the one case the imprisonment is for a period specified by the order of the judge; in the other it was for an indefinite time. In the one case there is what amounts, in my opinion, to an offence against the Court; in the other there was nothing in the nature of an offence. An order for commitment under the Debtors Act, 1869, appears to me to be entirely different in its nature and effect from the sort of process which was within the purview of the Act of Geo. 2; and therefore, apart from a further consideration which makes the case stronger, I should say that it cannot be within the terms either of that Act or of the Sheriffs Act, 1887. But there is this further consideration. As I have said, the Act of 1887 is a consolidation Act, and the provision in question is in substantially the same terms as that of the Act of Geo. 2, and therefore, in order to determine the meaning of the provision, we must consider to what the Act of Geo. 2 was applicable. It has been determined that the Act of Geo. 2 applied only to arrest on mesne process. It was argued that there was no arrest on mesne process

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in 1887 to which the provision of the Sheriffs Act, 1887, could be applied, and therefore that it must be applied to something else. It appeared to me, after the long discussion which took place on the subject, that there were still some cases in which arrest on mesne process, or something of the same nature, would be applicable. If there is anything else to which the words "attachment for debt" in the section can be applied, there is no reason for extending the indulgence given by the provision to cases where it would be highly inconvenient, and where there would be no justification for it, viz., to cases where a man who has been ordered to pay a debt and has means to pay it, after ample opportunity given him, contumaciously refuses to do so. For these reasons I think that the provision of the 14th section of the Sheriffs Act, 1887, did not apply to this case, and therefore this appeal should be dismissed.

FRY, L.J. The question which we have to determine is as to the true construction of the 14th section of the Sheriffs Act, 1887. That question may be stated to be whether an order of commitment under the Debtors Act, 1869, is an attachment for debt within the section. The Sheriffs Act, 1887, is a consolidating Act, and does not profess to amend or alter the provisions of the Acts consolidated. Primâ facie, therefore, the same effect ought to be given to its provisions as was given to those of the Acts for which it was substituted. The argument was put forward that, whereas in 1759, when the Act of Geo. 2 was passed, arrest on mesne process existed, to which that Act might be applied,—at the time when the Act of 1887 was passed arrest on mesne process had been abolished, and attachment for debt could not then have the signification which was given to it under the older Act; that some signification must be given to it; and that the only possible signification was that it applied to orders of commitment under the 5th section of the Debtors Act, 1869. That argument seems deserving of serious attention. It is plain, according to the decision in *Evans* v. *Atkins* (1), that the Act of Geo. 2 only applied to mesne process. Lord Kenyon, who presided over the Court which decided that

(1) 4 T. R. 555.

case, stated that such had always been the opinion in Westminster Hall ever since the Act was passed in 1759. From the statement so made, no doubt correctly, it would appear that that construction had been uniformly given to the Act previously to the time of that judgment; and, so far as appears, the same construction has been uniformly accepted since that judgment; for the learning and industry of counsel could not produce a single authority to the contrary. In the year 1838, the statute 1 & 2 Vict. c. 110, was passed, which was said to have abolished arrest on mesne process altogether, and so to have put an end to the subject-matter upon which the provisions of the Act of Geo. 2 operated. That statement seems to me to be erroneous. The 1st section of the statute enacts that no person shall be arrested upon mesne process in any civil action in any inferior Court whatsoever, or (except in the cases and in the manner thereinafter provided for) in any superior Court. The 3rd section gives power to a judge of a superior Court to order a defendant to be arrested where there is probable cause for believing that he is about to quit England. Therefore, the effect of the statute was not to abolish arrest on mesne process, but to confine it to certain cases and modify its operation. A further question of some nicety upon the language of the Act is, whether there might not still be arrest on mesne process at the suit of the Crown notwithstanding the Act. It is part of the prerogative of the Crown to avail itself of any process of which a subject might avail himself in an action; and consequently the Crown would have a right to avail itself of arrest on mesne process, though it might not have been in the habit of resorting to such process. I will not embark on the question whether the right of the Crown in this respect has or has not been taken away by the Act; it is not clear that it has been taken away; but, if it has not, then, at any rate in theory, there is another case in which arrest on mesne process still exists. But it is enough if it still exists in one case. That being so, when the Act of 1887, which as I have said was merely a consolidation Act, was passed, arrest on mesne process still subsisted, though in a restricted and modified form, and s. 14 (1) of the Act has therefore a subject-matter on which it can operate as the 1st section of the Act of Geo. 2 operated. There-

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fore, the argument put forward appears to me to fail. Under these circumstances, I think we ought to put upon the Act of 1887 the same construction as was put upon the Act of Geo. 2 by uniform practice and by the decision of the Queen's Bench rather than give a wholly new effect to a mere consolidation Act. For these reasons I think the appeal should be dismissed. (1)

LOPES, L.J. I agree. The Act of 1887 is, as has been observed, a consolidation Act, and does not purport to amend or alter the law. Sect. 14, sub-s. (1) of that Act is substantially a re-enactment of s. 1 of 32 Geo. 2, c. 28. That section only applied to arrest on mesne process. In my opinion the provision of s. 14 (1) of the Act of 1887 has no further operation, and does not apply to commitments under the 5th section of the Debtors Act, 1869. It was said that this construction would give the provision nothing on which to operate. Even if that were so, I am not prepared to say that the section ought to have the operation contended for; but there are cases in which arrest in the nature of arrest on mesne process is still applicable, and therefore to which the section may apply. I should be inclined to think that arrest on mesne process still exists in the case of Crown debts; but there is no doubt that by leave of a judge such an arrest can still be made in cases where there is ground for believing that the defendant is about to leave England. Therefore I think that the conclusion arrived at by the Divisional Court was correct, and their judgment should be affirmed.

*Appeal dismissed.*

Solicitors for plaintiff: *Paterson & Sons.*

Solicitor for defendant: *W. H. Herbert, for J. Harvey Simpson.*

E. L.

(1) The reporter has kindly called my attention to an error in this judgment. It proceeds on the footing that mesne process under 1 & 2 Vict. c. 110, was in force when the Act of 1887 was passed, whereas in fact it had been abolished by the 6th section of the statute of 1869, 32 & 33 Vict. c. 62. But although mesne process was in terms abolished, yet a new form of arrest was by the same section of the Act of 1869 created, under which in certain cases arrest can take place before judgment and until security has been given. This appears to me to be in substance a new form of mesne process, and to this the statute of 1887 must, I think, be taken to refer. In spite, therefore, of my error, I think my judgment right.—EDWARD FRY.

[IN THE COURT OF APPEAL.]

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*May* 16

SNOWDEN *v.* BAYNES.

*Negligence—Master and Servant—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 3.

In an action for compensation, under the Employers' Liability Act, 1880, it appeared that the plaintiff was employed by the defendant to work at a machine in a shed. A carpenter, also in the employment of the defendant, used to receive directions from him or his foreman as to the work to be done, and to give orders to the plaintiff and others as to what work each of them should do, which orders they were bound to obey; but he had no control over the plaintiff in his work. One morning the plaintiff was instructed by the carpenter as usual as to the work to be done by him. The plaintiff worked at it, and while he was working overtime in the evening the carpenter proceeded to stack timber in the shed, which was not safe for two persons to work in at the same time. By the negligence of the carpenter some of the timber fell, causing injury to the plaintiff:—

*Held*, that, it not being shewn that the carpenter had any authority to tell the plaintiff where or at what time he was to work, there was no evidence of any order given by the carpenter which led to the accident, and consequently that the plaintiff was not entitled to recover.

Decision of Queen's Bench Division (24 Q. B. D. 568) affirmed.

APPEAL by the plaintiff against the judgment of a Divisional Court (Pollock, B., and Wills, J.) (1), for the defendant.

The facts are stated in the former report, and it is unnecessary to repeat them.

*Cock, Q.C.*, and *J. F. P. Rawlinson*, for the plaintiff.

*A. J. Walter*, for the defendant, was not heard.

LORD ESHER, M.R. Unless the plaintiff can shew that Sellick had authority to tell him where he was to work and at what time, he cannot succeed in his action. I cannot see any evidence of such an authority. The evidence shews that the only authority of Sellick was to tell the plaintiff what work he was to do. There is no evidence that Sellick had any authority to tell the plaintiff to work overtime, or that under his agreement with the defendant the plaintiff was bound to work overtime if Sellick

(1) 24 Q. B. D. 568.

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told him to do so. There is, therefore, no evidence of any order given to the plaintiff by Sellick which led to the accident.

FRY, L.J. I agree. The accident arose from the plaintiff's working overtime by his own voluntary act.

LOPES, L.J. I do not think that Sellick was such a person as is contemplated by s. 1, sub-s. 3, of the Act. There is no evidence that Sellick had authority to tell the plaintiff where he was to work, or at what time, or that the plaintiff was bound to conform to any such orders given to him by Sellick.

*Appeal dismissed.*

Solicitors: *Judge & Priestly; E. Hodgskin Peach.*

W. L. C.

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*April* 18, 21

[IN THE COURT OF APPEAL.]

ELDER *v.* CARTER.
EX PARTE SLIDE AND SPUR GOLD MINING COMPANY.

*Practice—Production of Documents—Persons not Parties to the Proceedings—Order XXXVII., r. 7.*

Rule 7 of Order XXXVII., under which the Court has power in any cause or matter "at any stage of the proceedings" to order the attendance of any person for the purpose of producing any documents which the Court may think fit to be produced, and which such person could be compelled to produce at the hearing or trial, was not made for the purpose of giving to litigants any new right to discovery against persons not parties to the proceedings, but in order to remove the difficulties which existed before the order was made in compelling the production of documents by parties at any stage of the proceedings other than the hearing or trial.

The Court has no jurisdiction to order a person not a party to the proceedings to produce a document belonging to him, unless the parties to the proceedings are entitled to the production of such document for the purpose of justice at the moment the order is made; e.g., for the purpose of a pending trial, hearing, or application, or in order to carry out or complete an order which has already been obtained.

APPEAL from an order of the Divisional Court (Huddleston, B., and Grantham, J.), in an interpleader proceeding, directing the attendance of the Slide and Spur Gold Mining Company to produce certain books, writings, and documents.

The defendant, being a judgment creditor of one Haldeman,

obtained an order charging Haldeman's interest in 375,000 shares in the company which were standing in the name of the plaintiff, but (as the defendant alleged) merely as trustee for Haldeman.

An interpleader issue was afterwards directed between the plaintiff and the defendant to determine Haldeman's interest in the shares in question Before the trial of this issue the defendant took out a summons for an order directing the attendance of the company, "by their secretary or other proper officer, for the purpose of producing their books, writings, or other documents containing any entries relating either to registration, transfer, ownership, or other dealing with" the 375,000 shares, and "that the secretary or other officer of the said company be directed to attend before such persons at such time and place as may be ordered, and there to produce the said books, writings, and other documents for the inspection of" the defendant and his solicitors or agents, and to permit him or them to make copies of or extracts therefrom of the entries relating to the said shares; and asking also that the action might be stayed until such inspection should be had.

The company were the only respondents to this summons, and the discovery was sought for the general purposes of the interpleader issue, and not for the purpose of any summons or motion pending before the Court.

The summons for production was referred by the master to Denman, J., who referred it to the Divisional Court.

The hearing before the Divisional Court took place on April 18, 1890, when it was contended by counsel for the company that there was no jurisdiction to make an order for production of documents against persons not parties to the proceeding; but the Court considered the judgment of Lord Coleridge, C.J., in the *Central News Co.* v. *Eastern News Telegraph Co.* (1), a decision that the Court had such jurisdiction, and that the suggestion of Watkin Williams, J., in the same case, that Order XXXVII., r. 7, might be ultrà vires if it purported to authorize an order for production against a stranger, was an obiter dictum by which they were not bound; and the Court accordingly made an order

(1) 53 L. J. (Q.B.) 236.

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for production in the terms of the application. The company appealed.

*C. Johnston Edwards*, for the company. Order XXXVII., r. 7, does not confer upon litigants any new rights of discovery against strangers to the proceeding. The decision in *Warner* v. *Mosses* (1), which turned upon rule 4 of Order XXXVII. of the Rules of Court, 1875, virtually re-enacted by Order XXXVII., r. 5, of the orders now in force, shews that the rules are not to be construed as enlarging the jurisdiction of the Court

*Howard* v. *Beall* (2), turned upon s. 7 of the Bankers Books Evidence Act, and has no application. The right of discovery now claimed against the company is an entirely new one, and it is claimed not for the purpose of any particular pending motion, summons, or other proceeding, but for the general purposes of the interpleader issue. Lord Coleridge, C.J., in the *Central News Co.* v. *Eastern News Telegraph Co* (3), in refusing to make an order under rule 7 before trial against persons not parties to the action and where it was not required for the purposes of any particular motion or proceeding, said that any application for the exercise of the powers of this rule should be granted with the most watchful jealousy; and Watkin Williams, J., suggested that if the rule did confer this power over perfect strangers it might be contended that it was ultrà vires. Assuming that the application is warranted by rule 7 of Order XXXVII., the order itself is ultrà vires Before the Judicature Acts, under 1 Wm. 4, c. 22, s. 5, and the Common Law Procedure Act, 1854, ss. 46, 47, the Courts had no jurisdiction to compel production of documents as against persons not parties to the proceedings; and s. 17 of the Judicature Act of 1875 only authorizes the making of rules for "regulating the pleading, practice, and procedure" of the Courts, so that the rules made thereunder cannot enlarge or alter their jurisdiction. Then, again, the defendant either knows or does not know what material documents are in the possession of the company. If he does he can get production of them through a subpœna duces tecum; if he does not, he is attempting to get by a side-wind the means of manufacturing a case.

(1) 16 Ch D. 100. (2) 23 Q. B. D. 1. (3) 53 L. J. (Q.B.) 236.

[BOWEN, L.J. If the order is to be construed as your opponent contends, I do not see the use of the Bankers' Books Evidence Act (42 & 43 Vict. c. 11, s. 7: see *Arnott* v. *Hayes*. (1))]

The order made is also objectionable in point of form, being a roving order which does not name or shew upon the face of it what documents are to be produced.

[He also referred to *Straker* v. *Reynolds* (2) and *Rishdon* v. *White*. (3)]

*Vennell*, for the defendant. The Court had jurisdiction to make the order. Rule 7 of Order XXXVII. is in the widest possible terms, and gives the Court power to order the attendance of any person to produce at any stage of the proceedings any document which the Court or a judge may think fit to be produced. There is no limit to or qualification of the generality of the rule. It is clearly an extension of the powers of the Court, which, under the practice obtaining at the time the rule was made, could only order production of documents at the trial or hearing of a cause or matter; and in *Central News Co.* v. *Eastern News Telegraph Co.* (4), while both the judges carefully guarded themselves from saying that the Court had not the power to order production by a person not a party to the proceedings, Lord Coleridge, C.J., went further, and did not doubt "that the Court had power to make such an order."

The enactment in s. 7 of the Bankers' Books Evidence Act, 1879, was rendered necessary by the peculiar character of the business transacted by bankers, which requires the perpetual and almost momentary use of their books. This is not a case in which the persons required to produce the documents are strangers to the action. It is true that the company are not actually parties to it, but they are so interested in the interpleader that no injustice will be done them by the order.

*Edwards*, was not heard in reply.

LINDLEY, L.J. The question is, whether this order can be supported. I confess that when it was first read it appeared to be one the like of which I had never seen or heard of; and the

(1) 36 Ch. D. 731.
(2) 22 Q. B. D. 262.
(3) 5 Times L. R. 59.
(4) 53 L. J. (Q.B.) 236.

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more the matter is reflected upon, the more difficult it is to support the order. Let us see exactly how the matter stands. This company is no party whatever to the interpleader issue. The company has no more to do with it—I do not say in point of fact, but in point of law—than I have, or any stranger has. One of the parties to the issue says: "Somebody has got some books which I should like to see for the purpose of enabling me to go into Court and try my case upon that issue. There is Order XXXVII., rule 7, which enables the Court, if it thinks fit, to order anybody to produce anything at any time, and I can apply to the Court and get an order to see those books." That, to my mind, is a very startling proposition. It is contrary to principle. Putting aside the facts of this particular case, the general proposition contended for is, that if any litigant thinks that documents held by anybody else who is not a party will be useful to him, and if the litigant wants to see them, he can get inspection of those documents from such person. That is entirely contrary to every rule relating to discovery which has ever existed, either on the common law side or the equity side of the Court. It has long been a rule well established (the origin of it I do not recollect) that you cannot get discovery except from a party to your action. There is another rule, equally old and equally well-established—that you cannot make a mere witness a party in order to get discovery from him. That would be abusing the doctrine of production and discovery. This particular order has infringed both those rules. The inconvenience and danger of granting such an application as this must, I think, be apparent to anybody who considers it.

But then reliance is placed on Order XXXVII., r. 7. Now, on looking at that rule, wide as its language is, the rule does not say at what time, or at what place, or for what purpose, this order is to be made, except for the purpose of producing documents. The rule is simple enough, and its history is this. There were difficulties in obtaining the attendance of witnesses and the production of documents at Common Law except on the trial of actions, and there were statutes passed to remove those difficulties—the statute 1 Wm. 4, c. 22, s. 5, passed in 1831, and the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125),

ss. 46, 47; and when the rules had to be recast so as to apply, not only to Common Law actions, but to all actions—Chancery and other actions—in the High Court, it became necessary to modify and change the words, so as to make them applicable to all proceedings in all Courts. That is the history of this rule, and there is no doubt whatever that it is a most useful rule; but the question is, whether we are to construe it as introducing a practice entirely unheard of before, and contrary, as I have endeavoured to shew, to all principle and all justice. Now, the answer to the defendant's argument is this, that you must look at this rule with reference to the purpose for which it was introduced; and it cannot be said that that purpose was to give a litigant a right to discovery which he did not previously possess against persons not parties to the action. That was not the purpose; so to construe it would be to abuse the rule. The object of it was to remove the difficulties which existed in compelling production of documents at various stages of the proceedings, both before and after the trial, at the hearing of motions, petitions, summonses and examinations of witnesses, and the like; and that is the real legitimate object of the rule, which is necessarily not confined to production on the hearing of any motion or petition, because there may be some proceeding before an official referee, or an examiner, or a commission to take evidence, to which this rule would apply, and I am not at all desirous of doing more than to say that the rule cannot be construed so as to enable a litigant to obtain discovery from any person who is not a party to the proceedings. That is what is sought by this application. I have no doubt whatever that that is the true view to take of the rule; and I think, when the authorities, such as they are (and they are very few), are looked at, there is not one which is adverse to that view. Mathew, J.'s view, as expressed in the case of *Central News Co.* v. *Eastern News Telegraph Co.* (1), is clear that this rule does in reality no more than incorporate the preceding statutory enactment to which I have referred; and I think that is so—with this exception, that the language is made a little more general, so as to extend it to all proceedings in the High Court.

(1) W. N. (1884) p. 23.

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Now, Watkin Williams, J., when the case of the *Central News Co.* v. *Eastern News Telegraph Co.* (1) came before the Queen's Bench Division, said (2), and I think very justly, that if rule 7 did confer this power over perfect strangers, it might be a question whether it was not ultrà vires; and I concur in that view. If it is to be so construed as to give any litigant the right to see the books of anybody who is not a party to the litigation, I should say that it would be ultrà vires. But I am satisfied that that is not the true construction or meaning of the rule.

There is no other case that I think worth mentioning with reference to this matter.

Then it is said that, upon the facts, this company, although not nominally a party to this proceeding, is really so interested in it that there would be no injustice done in this particular case. I think that is so. Without going into the merits, I think it is very likely that, in this particular case, there would not be any particular injustice done. I will assume that; but the principle involved in that line of argument is a dangerous one, and I, for one, cannot be the first to sanction such a proceeding as is contended for. It appears to me that sound principle is entirely against this order. Therefore, the appeal will be allowed, and the order will be discharged.

BOWEN, L.J. I am of the same opinion.

Rule 7 of Order XXXVII., is not intended to enlarge the rights of a litigant to discovery against third persons who have nothing to do with the action, nor to enlarge his rights to production of documents against them. The rule is one of "practice and procedure," and therefore is, and can only be, a rule which is intended to enlarge the facilities of obtaining production when production is necessary for the purpose of justice.

Now, in the present instance, the production of the document at the present moment cannot be necessary for the purpose of justice. Whoever heard that there was a right on the part of a litigant, at a time when there was no pending motion and no pending trial, to obtain inspection of a document which belongs to a third person, unless indeed in the possible case where pro-

(1) W. N. (1884) p. 23. (2) 53 L. J. (Q.B.) 236.

duction of such a document was necessary to carry out an order which had already been obtained?

The truth is, that no judge has a right to think the production of such a document fit at this particular time, inasmuch as it is interfering with rights of third parties at a moment when there is no evidence being taken in the cause, and when the presence of the document is not necessary for the purpose of carrying out or completing any order which has been made.

The Common Law Procedure Act, 1854, s. 42, introduced into common law a very valuable means of obtaining production of documents on the hearing of motions and summonses. At common law, the ordinary subpœna was a subpœna ad testificandum, and required the witness to be present in Court for the purpose of giving evidence to be used at the trial. The Common Law Procedure Act gave judges the power of compelling the attendance of witnesses to be examined, and of directing that documents be produced upon the hearing of motions and summonses. Then came rule 7 of Order XXXVII., the object and scope of which (as has always been said with regard to the Judicature Act) is not to increase rights as against third persons, but to give further facilities for enforcing rights which already exist. That rule does, to a certain extent, go further than the Common Law Procedure Act, because it abstains from making it a condition precedent that an order should be made upon the hearing of a motion or a summons. It says that the order may be made "at any stage of the proceedings" whenever production could be compelled at the hearing or trial. I do not think we ought to try to define the cases exhaustively in which production may be proper. It is sufficient to say that I could conceive a case in which production of a document might be proper, though there was no motion or summons pending; for instance, if an order had already been made, and the non-production of the document by the third person was a defeating of the rights which had already been declared and a defeating of the order which had already been obtained. But I am as certain as one can be of anything with regard to practice, that it is not intended to enact that at any stage of a proceeding a judge may make, subject to his discretion, an order on a third person for production of a document which belongs to the third person, unless the production of it at

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that moment is a thing to which the parties are entitled for the purpose of justice; and you are not entitled, for the purpose of justice at any moment during suit, simply because you are a litigant, to see what is in the possession of a third person and to have production of it. Such a thing was never heard of. I do not believe it was ever dreamt of until rule 7 was submitted to the ingenuity of counsel. An attempt has been made to extract out of a rule which has simply got to do with "practice and procedure" in an action, a power of obtaining inspection from a third person outside the action. If such a power existed, it would be most inquisitorial, and might be used for purposes of infinite oppression. In this particular case, I dare say it would work no oppression at all; but we have to construe the rule.

*Appeal allowed.*

Solicitors: *Burn & Berridge; H. C. Barker.*

W. W. K.

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*May* 12; *June* 21.

[CROWN CASE RESERVED.]

THE QUEEN *v.* PAUL.

*Criminal Law—Evidence of Girl not given upon Oath—Attempt to have unlawful Carnal Knowledge of Girl under Thirteen—Indecent Assault—Criminal Law Amendment Act,* 1885 (48 *&* 49 *Vict. c.* 69), *ss.* 4, 9—24 *&* 25 *Vict. c.* 100, *s.* 52.

On an indictment in two counts, the first charging the prisoner under s. 4 of the Criminal Law Amendment Act, 1885, with an attempt to have carnal knowledge of a girl under thirteen, the second charging him with indecent assault, the evidence of the girl, though not given on oath, was received in accordance with s. 4 of the Criminal Law Amendment Act, 1885, and was corroborated by other material evidence as therein required.

The judge held that there was no evidence of the offence charged in the first count, but that with respect to the charge of indecent assault, though the sworn evidence was in itself insufficient, the unsworn evidence, if admissible, and the sworn evidence taken together, constituted sufficient evidence to be left to the jury, and he directed the jury to take into consideration both the unsworn and the sworn evidence. The jury convicted the prisoner:—

*Held*, that the unsworn evidence of the girl received as above stated was not admissible in support of the charge of indecent assault, and that the conviction must be quashed.

*Reg.* v. *Wealand* (20 Q. B. D. 827) considered.

CASE stated by the Recorder of London.

On the trial of the prisoner, William Paul, at the Central

Criminal Court, on an indictment in two counts, the first charging him under s. 4 of the Criminal Law Amendment Act, 1885, with an attempt to have unlawful carnal knowledge of Frances Coles, a girl under thirteen, the second charging him under s. 52 of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), with an indecent assault upon her, the unsworn evidence of the girl was received in accordance with s. 4 of the Criminal Law Amendment Act, 1885, as part of the evidence for the prosecution.

The Recorder held that on the first count of the indictment there was no evidence against the prisoner, and that he was therefore entitled to be acquitted on that count; but that as regarded the second count, that charging him with an indecent assault, if the unsworn evidence of the girl, received as above stated, was legally admissible, it was corroborated by other material evidence, as required by s. 4 of the Criminal Law Amendment Act, 1885, and that though the sworn evidence was in itself insufficient, the sworn and the unsworn evidence, supposing the latter to be legally admissible as evidence under the count, might properly, taken together, be left to the jury as evidence of an indecent assault. Subject to the opinion of the Court on the question of the admissibility of the unsworn evidence, he directed the jury to take into consideration with respect to the charge in the second count both the sworn and the unsworn evidence. The jury found the prisoner guilty of an indecent assault. The question for the opinion of the Court was whether the conviction could under the circumstances be supported.

*George Elliott*, for the prisoner. The conviction cannot be supported. The unsworn testimony of the girl, received under the peculiar provisions of s. 4 of the Criminal Law Amendment Act, 1885 (1), in support of the charge of misdemeanour under

(1) By s. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), "Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony. . . .

"Any person who attempts to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanour. . .

"Where, upon the hearing of a charge under this section, the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of

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that section was not admissible evidence as regards the charge of indecent assault which was brought against the prisoner under another statute. The charges contained in the two counts are completely separate, and the jury should have been directed to ignore the girl's evidence and to acquit the prisoner. It is true that in *Reg.* v. *Wealand* (1) an unsworn deposition received under this section was held to be admissible evidence upon a conviction for indecent assault. But in that case the indictment contained only one count, a count for felony under the section, and the conviction took place under s. 9 of the same Act, which allows the jury to find a person thus indicted for felony guilty in the alternative of indecent assault. Here the charge of indecent assault did not depend in any way on the Criminal Law Amendment Act, 1885, and could only be proved according to the ordinary rules of evidence.

*C. F. Gill*, for the prosecution. The object of adding the second count was to enable the jury to convict the prisoner of an indecent assault, should the evidence prove him to have been guilty of this offence, though not of the statutory misdemeanour with which he was charged in the first count. The power of the jury to convict of indecent assault under s. 9 of the Criminal

the Court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given upon oath, if in the opinion of the Court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth: Provided that no person shall be liable to be convicted of the offence unless the testimony admitted by this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused."

By s. 9: "If upon the trial of any indictment for rape or any offence made felony by s. 4 of this Act, the jury shall be satisfied that the defendant is guilty of an offence under ss. 3, 4, or 5 of this Act, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in such indictment or of an attempt to commit the same, then and in every such case the jury may acquit the defendant of such felony, and find him guilty of such offence as aforesaid, or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such offence as aforesaid or for the misdemeanour of indecent assault."

(1) 20 Q. B. D. 827.

Law Amendment Act, 1885, appears to be strictly limited by the terms of the section to cases in which the accused is charged with rape or some offence which is made felony by the Act.

*Cur. adv. vult.*

June 21 HAWKINS, J. I am of opinion that the conviction in this case cannot be supported. The indictment in the first count charged the prisoner, under s. 4 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), with a misdemeanour in having attempted to have carnal knowledge of a girl under the age of thirteen years, and in the second count, under the 52nd section of the Offences Against the Person Act, 1861 (24 & 25 Vict. c. 100), with an indecent assault upon the same girl.

The case was tried before the Recorder of London at the Central Criminal Court. The girl being of tender years and not understanding the nature of an oath, her unsworn evidence was received under the provisions contained in s. 4 of the first-mentioned Act. At the close of the case for the prosecution, the Recorder held that there was no evidence of the attempt charged in the first count. As to that count, therefore, the prisoner was at the close of the summing-up acquitted by the jury. As to the second count the case states, that although the girl's statement was corroborated, as required by s. 4, by other material evidence implicating the prisoner, still such corroborative evidence without that of the girl was insufficient to justify a conviction. Objection was duly taken by the learned counsel for the prisoner, that the evidence of the girl without oath was altogether inadmissible upon the second count, and ought, therefore, so far as related to that count, to be excluded from the consideration of the jury. The Recorder, however, decided otherwise, and directed the jury, that in considering the second count they might have regard to the whole of the evidence before them, the unsworn as well as the sworn; and with that direction the jury found the prisoner guilty of an indecent assault.

Notwithstanding a passage to be found in 1 Hale, P. C. 634, which I shall cite hereafter, I do not suppose that any one would, before the passing of the Criminal Law Amendment Act, 1885, have ventured to suggest that the unsworn statement of

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the girl could have been received in support of any part of the indictment, no matter how strongly it might have been corroborated by other unobjectionable evidence. The Criminal Law Amendment Act, 1885, was passed with a view, among other things, to afford greater protection to young female children of tender years, who were often, when alone or in the companionship merely of other children of their own age, made the victims of wickedly lustful men, who desired carnal knowledge of their bodies, and who, by reason of the inability of such children to understand the nature of an oath, were frequently enabled to carry out their criminal desires with impunity. With a view to remedy this unsatisfactory state of things, it was by the 4th section of the Act enacted that, "Any person who unlawfully and carnally knows any girl under the age of thirteen years shall be guilty of felony. Any person who *attempts* to have unlawful carnal knowledge of any girl under the age of thirteen years shall be guilty of a misdemeanour." Later on in the same section occurs that enactment which has given rise to the question now before us, and which is in these terms: "Where, upon the hearing of *a charge under this section*, the girl in respect of whom the offence is charged to have been committed or any other child of tender years who is tendered as a witness does not, in the opinion of the Court or justices, understand the nature of an oath, the evidence of such girl, or other child of tender years, may be received, though not given upon oath, if in the opinion of the Court or justices, as the case may be, such girl or other child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth." There follows a proviso requiring corroborative evidence implicating the accused.

Although it does not directly affect the matter we have to decide, it may be interesting to note that the idea of admitting the evidence of an intelligent child of tender years without oath is not new. In Hale's Pleas of the Crown, vol. i., p. 634, dealing with the testimony of children in cases of *rape* occurs this passage: "It seems to me that if it appear to the Court that she hath that sense and understanding that she knows and considers the obligation of an oath, though she be under twelve years, she may be

sworn; thus we find it done in case of evidences against witches; an infant of nine years old was sworn: Dalt. cap. iii., p. 297 (*k*). But if it be an infant of such tender years, that in point of discretion the Court sees it unfit to swear her, yet I think she ought to be heard without oath to give the Court information, though singly of itself it ought not to move the jury to convict the offender, nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable; and my reasons are—1st. The nature of the offence, which is most times secret, and no other testimony can be had of the doing of the fact but the party upon whom it is committed, though there may be other concurrent proof of the fact when it is done. 2nd. Because, if the child complains presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of what the child told them without oath, and there is much more reason for the Court to hear the relation of the child herself than to receive it at second hand from those that swear they heard her say so; for such a relation may be falsified or otherwise represented at the second hand than when it was first delivered. But in both these cases, whether the infant be sworn or not, it is necessary, to render their evidence credible, that there should be concurrent evidence to make out the fact, and not to ground a conviction singly upon such an accusation with or without oath of an infant. For in many cases there may be reason to admit such witnesses to be heard, in cases especially of this nature, which yet the jury is not bound to believe; for the excellency of the trial by jury is in that they are the triers of the credit of the witnesses as well as the truth of the fact; it is one thing, whether a witness is admissible to be heard, another thing, whether they are to be believed when heard."

Notwithstanding this passage, it must, I think, be taken that, before the passing of the Criminal Law Amendment Act, 1885, whatever may have been done in some particular cases, no testimony whatever could on a criminal trial be received except upon oath; and that the testimony of an infant not competent to take an oath could not be accepted at all: see *Rex* v. *Brasier* (1);

(1) 1 Leach, 199; 1 East. P. C. 443.

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*Rex* v. *Powell.* (1) See also Best's Law of Evidence, 5th ed. p. 215, 223; Taylor on Evidence, 6th ed. vol. ii., p. 1194, where the subject is more fully discussed.

The exception to this general rule, relied on in support of this conviction, depends, therefore, absolutely and entirely upon the true interpretation of the language of the 4th section of the statute, beyond which we cannot look.

Now that section renders the evidence admissible only *upon the hearing of a charge under that section*, and the only charges to which that section relates are having or attempting to have carnal knowledge of a girl under thirteen years of age. The crimes of rape and indecent assault are not even referred to in the section from beginning to end. Why the exception allowing unsworn evidence was not extended to the offences of rape and indecent assaults, to the latter of which little children are perhaps even more often subjected than any other, I do not pretend to say. It may have been an oversight; it may have been intentional. I only know the exception is not, in fact, extended to either of such offences, and we must construe the Act as we find it.

It was suggested, however, that, inasmuch as the first count of the indictment was in respect of a charge upon the hearing of which the unsworn testimony of the girl was admissible, and as such unsworn testimony was received upon that charge, it became legal evidence upon the whole indictment, although, had the second count stood alone, it would have been clearly inadmissible. I confess I am startled by this proposition. *Reg.* v. *Wealand* (2) is said to be an authority in favour of that view. To this I cannot assent, and I purpose presently to point out the difference between that case and the present, which renders it no authority at all upon the question we have to decide.

Before doing so, however, I desire to offer one or two other observations in support of the view I take. In the first place, I must note that this indictment is for *misdemeanour*, and I do not imagine it will be disputed that several distinct and different misdemeanours may be charged in as many different counts of the same indictment, and, when so charged, they should, in my

(1) 1 Leach, 110. (2) 20 Q. B. D. 827.

judgment, be treated as though they had been made the subjects of so many different and distinct indictments: See, per Blackburn, J., in *Latham* v. *Reg.* (1), also *Reg.* v. *Campbell* (2), and *Reg.* v. *Ryalls* (3). See also *Taylor* on Evidence, 6th ed. vol. i, sec. 308, pp. 346, 347. Thus treating them, it seems to me to follow that no evidence which is not admissible upon the particular count under investigation can be used in support of it, simply because such evidence is admissible upon another charge, the subject of another count in the same indictment, any more than it would have been had the count under consideration formed the subject of a separate indictment. If it were otherwise, it would practically be in the power of a prosecutor to alter the law of evidence at his pleasure by including several misdemeanours in one indictment, instead of preferring several indictments, and so making every piece of evidence, though only strictly admissible upon one count, evidence upon the whole indictment. Let me illustrate this by supposing the case of the trial of an indictment for false pretences charging in several counts as many distinct and different offences. On one of those counts the deposition of a sick witness, unable to travel, taken under 11 & 12 Vict. c. 42, s. 17, in the presence of the prisoner, upon the charge contained in that count, would be clearly admissible upon that specific charge; but it would as clearly not be admissible upon the other distinctly different charges upon which it was not so taken: see *Reg.* v. *Ledbetter.* (4) Another illustration may be found by supposing an indictment containing three counts for separate and distinct larcenies under s. 5 of 24 & 25 Vict. c. 96. Could it be contended that the deposition of a sick witness, taken on one charge of stealing, would be evidence upon the other charges simply because they were included in the same indictment? Take again the case of a prisoner charged with an offence under the Criminal Law Amendment Act, 1885, who by s. 20 is made a competent witness on such charge. Could he, if the indictment against him contained counts for an indecent and also for a common assault, insist upon giving evidence in his defence as to a common assault, though such evidence would be

(1) 33 L. J. (M.C.) 197.
(2) 11 Q B. 799, 814.
(3) 11 Q B. 781, 795.
(4) 3 C. & K 108.

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inadmissible if the counts were, as they might be, separately tried? Take again this very case. Suppose a count, either for an indecent or a common assault, committed on a different day to have been added to the present indictment. Could the girl's unsworn testimony have been used to prove that count?

*Reg.* v. *Owen* (1) in no degree militates against this view. There the prisoner was tried on an indictment containing two counts, one for an indecent, the other for a common assault, and he gave evidence in his own defence. In his evidence he admitted a common assault, but denied an indecent one. Of the latter he was acquitted; of the former he was found guilty. On a case reserved, it was objected that the admission of the prisoner in his evidence of the common assault was not admissible because he could not be a witness for himself on such a charge. But it was held that the objection had no substance, because it was in the option of the prisoner to be examined as a witness, and if, electing to be sworn, he voluntarily chose to give evidence or to make a statement, not only as to the count on which his evidence was admissible, but also as to one on which he was not compelled to say anything, his statement was properly receivable against himself, not by reason of the statute, but as an admission. That decision was clearly right; but I observe that the Lord Chief Justice, in delivering the judgment of the Court, said: "The direction to the jury would perhaps have been more complete if the learned chairman had told them that the prisoner was only an admissible witness to the indecent assault, and had no right to give evidence on the question as to the common assault, which they must determine without reference to his testimony." No such direction was given to the jury in the present case; but they were led to treat the evidence objected to as admissible upon the whole indictment, which, in my opinion, was wrong. Perhaps I may venture to suggest one test which seems to me to be crucial. Suppose the girl to have negatived any attempt to have carnal knowledge of her person, and the counsel for the prosecution then to have directed attention to and proceeded to examine her pointedly respecting the indecent assault, would he, after objection, have been permitted so to do? If to this

(1) 20 Q. B. D. 829.

question the answer is "No," as I conceive it must be, it is to my mind conclusive in favour of the objection now raised for the prisoner.

Direct authority upon the subject can hardly be looked for; but in Taylor on Evidence, 6th ed. vol. i. sec. 754, p. 733, the rule, as I understand it, is clearly stated, viz., that whatever issues are joined upon any counts or pleas are to be tried by the jury distinctly from each other, citing among other authorities: *Gould* v. *Oliver*, per Tindal, C.J. (1) It is true that s. 754 has reference to civil causes; but possibly even greater strictness prevails in criminal cases: see also s. 826, p. 807. The case of *Reg.* v. *Fuidge* (2) was referred to by the prisoner's counsel in the course of the argument; but I do not think it materially assists the elucidation of the question now raised.

If the case of the prosecution is put upon the ground that evidence admissible and given upon any one count is admissible upon the whole indictment, even though it contains forty counts, that is a fallacy and untenable. It is no more admissible than it is inadmissible upon the whole indictment. Why, I ask, is it more reasonable or logical, or in accordance with justice, to say that, being admissible on one count out of forty, it is admissible upon the remaining thirty-nine counts upon which it would otherwise be inadmissible than it would be to say that, because it is inadmissible upon thirty-nine counts, it is therefore inadmissible on the one count on which it would otherwise be admissible? Justice would seem to be rather in favour of rejecting the evidence altogether because it is not admissible on every count, for to admit it is calculated greatly to prejudice the jury against the prisoner, it being difficult for them, even with the most careful summing-up of the judge, to dismiss from their minds evidence once before them for any purpose. The truth is that neither proposition is tenable. The true solution is, that upon the one count it is admissible because the statute has made it so, upon the other count it is inadmissible because the statute has left it, as it was, inadmissible; and as to any prejudice created by its reception on the one count, the judge ought to do his best to counteract such prejudice by telling the jury to ignore the

(1) 2 M. & G. 234. (2) 33 L. J. (M.C.) 74.

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evidence as far as possible in considering those counts on which it is inadmissible.

I now proceed to discuss *Reg.* v. *Wealand* (1), and to point out the clear distinction between that case and the present. In that case the prisoner was indicted in one count simply for the felony of carnally knowing a girl under thirteen. The evidence of the girl, though not upon oath, was received under s. 4, and upon that charge it was clearly admissible within the express language of the statute. The jury found the prisoner not guilty of the felony; but, being satisfied that he was guilty of an indecent assault, they, under the express provision contained in s. 9 of the Act, found him guilty of such assault. But for this section they would have been bound to acquit him altogether. Now in that case no objection could have been made to the unsworn testimony; for the 4th section expressly made it admissible upon the only count which the jury had to dispose of, and in authorizing the jury *under that count* to convict of an indecent assault, though no indecent assault was charged, the legislature must be taken to have intended them, in the consideration of their verdict, to deal with all the evidence before them, forgetting that the exception to the general rule of evidence was not made to extend to charges other than those in s. 4. I was a party to the judgment, and agree in all the observations of the Lord Chief Justice in delivering it, and I venture to think they are rather in favour of than against my view of this case. In the present case, upon the first count, no doubt the evidence was admissible, but upon that count the jury had no power to convict of an indecent assault; while upon the second count, which was for an indecent assault simply, the evidence was inadmissible.

It is strangely anomalous to suppose that a person being acquitted upon a charge on which unsworn evidence was admissible should nevertheless be lawfully convicted on such evidence upon a count on which it was wholly inadmissible. To my mind such a proposition is contrary to reason, good sense, and law. I note particularly an observation in the judgment of the Lord Chief Justice in *Reg.* v. *Wealand* (1), that the anomaly therein

(1) 20 Q. B. D. 827.

pointed out "may lead to a prisoner being indicted for the graver offence under s. 4, *when it is known that he can only be convicted of a less offence under s.* 9 on unsworn evidence given in support of the charge under s. 4." On this I can only say that, should such a course be adopted, I should look upon it as a scandalous abuse of the law with a view to convict the accused of a grave offence upon evidence known to be inadmissible if the indictment were confined to an honest statement of the real charge.

I agree that the law created by the statute is in a very unsatisfactory state, and requires much amendment; but upon the point raised in this case I entertain no doubt that the conviction cannot be sustained, and ought to be quashed.

LORD COLERIDGE, C.J., MATHEW, DAY, and GRANTHAM, J.J., concurred.

*Conviction quashed.*

Solicitor for the prosecution: *Solicitor to the Treasury.*
Solicitor for the prisoner: *W. Edwin.*

H. D. W.

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[CROWN CASE RESERVED.]

*May* 10.

THE QUEEN *v.* BARKER.

*Highway—Liability to Repair ratione tenuræ—Turnpike Trust—Alteration of Road by Trustees—Expiration of Trust—Indictment against Owner not in occupation of Land—Alteration of Highway.*

An owner of lands who is not the occupier of them cannot be charged ratione tenuræ with the repair of a common highway.

When a highway repairable ratione tenuræ is, under statutory powers, so altered in its nature and course as to be practically destroyed, the liability to repair ratione tenuræ ceases.

A highway which had been from time immemorial repaired ratione tenuræ was paved to the width of nine feet in the centre with stone got from the land charged with the repair. The trustees under a Turnpike Act converted the highway into a macadamized road by taking up the old pavement and laying down to the width of fifteen feet in the centre stone brought from places without the county, and they stopped and diverted the course of the highway in parts so as to straighten it. On the expiration of the turnpike trust, the

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defendant, the owner of the land charged, who was not in occupation of it, was indicted and convicted for non-repair of the road ratione tenuræ:—

*Held*, first, that the defendant, not being the occupier of the land, was not liable; secondly, that the road, the subject of repair, must be taken to have been destroyed, and that the liability to repair ratione tenuræ had therefore ceased.

CASE stated by the Chairman of the Cheshire Quarter Sessions.

The defendant was indicted for the non-repair of two separate highways in the township of Huntington. The indictment contained two counts, each describing the part of the highway to which it referred, and alleging that the defendant was bound to repair it ratione tenuræ.

The indictment was heard on December 30, 1889, when the defendant was found guilty upon both counts of the indictment; but the Court reserved judgment and sentence pending the decision of points reserved for the consideration of the Court of Crown Cases Reserved. The roads so alleged to be out of repair were both ancient highways. As to the road mentioned in the first count, it was proved that before the passing of the Chester, Farndon, and Worthenbury Turnpike Road Act, 1854, it consisted of an ordinary fenced road varying in width from about twenty to thirty feet, of which a space nine feet wide only was paved with stones along the centre, the sides not being metalled, but being of grass or earth. The stone of which the pavement was formed was got in the township from the lands alleged in the indictment to be charged with the repair of the way. The road, which was an ordinary carriage highway, was at that time repaired by J. B. Wood, the owner of the lands, by reason of his being such owner or his tenants. The Act of Parliament before mentioned enacted that the trustees appointed by the Act should have power to make and maintain certain turnpike roads in the lines and in and through the lands shewn on deposited plans, and to widen, alter, and divert in the manner and to the extent shewn on the plans the whole or parts of certain roads, including the road mentioned in the first count of the indictment, and to stop up and discontinue such portions of the existing roads as would become unnecessary by reason of the said intended turnpike roads. Sect. 29 of the Act provided that in case the tolls authorized to be taken by virtue of the Act should be

insufficient to answer the expenses of maintaining and keeping in repair the roads, the several townships and persons then by law liable, either ratione tenuræ or otherwise, to the repair thereof, should be and should continue liable to the maintenance and repair thereof in such and the same manner and to the same extent as such townships or persons were then liable by law to the maintenance and repair thereof.

The trustees made the turnpike road in the line shown on the plan accompanying the case. For the purpose of forming the new road the trustees took up the old pavement of nine feet wide, and converted the road into a macadamized road, the part of the road that was so macadamized being about fifteen feet in width. There was no sufficient foundation provided for the macadamized road by the trustees. The stones of the old pavement were used in the construction of the macadamized road. The macadam was brought from places out of the county. The actual width of the road between the fences was not materially altered, and its width between the fences was now about the same as it was before it became a turnpike road.

There was evidence that J. B. Wood, after the expiration of the turnpike trust in 1876, acting, as was alleged, under a mistaken impression as to his liability, repaired the road as a macadamized road, and continued to do so until the date of his death in 1885. The defendant, who was the devisee in trust of the lands under J. B Wood's will, continued to repair the road under the belief that he was legally liable to do so until a few days before the trial of the indictment.

It was contended for the prosecution that the defendant was liable to put the road mentioned in the first count into good repair as a macadamized road, the road having ceased to be a turnpike road, as he was a devisee in trust of the late J. B. Wood, the person liable to repair the road ratione tenuræ prior to the road becoming a turnpike road.

It was proved that the defendant was not the occupier of any of the lands mentioned in the indictment or of any lands whatever in the county of Chester, but that he was the owner of a considerable quantity of the land immediately abutting on one side of the highway mentioned in the first count of the

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indictment, and also that he was the owner of the land immediately abutting on one side of the highway mentioned in the second count of the indictment.

It was contended for the defendant that the road in the first count had been so altered by diversion and conversion into a macadamized road as to destroy any liability ratione tenuræ, and that as to the roads in both counts he was not the occupier of any of the lands in respect of the tenure of which he was alleged to be liable.

The jury found that the roads were out of repair; that the road mentioned in the first count, before it was converted into a turnpike road, had a stone pavement of nine feet wide in the centre with grass or earth sides, and that it was then altered by the turnpike trustees as shewn on the plan, and by their taking up the pavement and converting the road into a macadamized road as described; and (subject to the two points of law hereinbefore mentioned) they found the defendant liable to repair both the roads by reason of his holding lands.

*Marshall*, for the defendant. First, the liability of the defendant to repair the road in the first count ceased on the destruction of the old road, as in the case where a horse-way of three feet wide was changed into a carriage-road of fifteen yards wide: *Reg* v. *Pickering*. (1)

By s. 29 of the Local Turnpike Act, persons then liable to repair that road ratione tenuræ were to continue liable to repair it, but only "in such and the same manner and to the same extent" as they then were liable. That provision lapsed with the Act, and cannot affect the defendant afterwards. His liability, if any, can only be proved by evidence of immemorial repair by his predecessors. But inasmuch as the old paving has been taken away and the course and nature of the road altered, he cannot repair the old road as heretofore. The General Turnpike Act Amendment Act (4 Geo. 4, c. 95), s. 68, enacted that every person liable by tenure to the repair of any old turnpike road which should be widened, altered, diverted, or turned, should continue liable to the repair of such new road, set out in

(1) 41 J. P. 564.

lieu of the old road, or so much thereof as should be equal to the burthen and expense of repairing such old road from which he should be exonerated by the widening, altering, diverting, or turning thereof." But the liability cannot be increased: *Reg.* v. *Inhabitants of Cluworth* (1); *Rex* v. *Inhabitants of Surrey* (2); *Rex* v. *Inhabitants of Middlesex.* (3) The repairs done since the expiration of the trust, but under a mistake as to liability, will not render the defendant liable: *Rex* v. *Inhabitants of Edmonton.* (4)

Secondly, the defendant not being the occupier of the lands mentioned in the indictment, but only the owner of them, is not liable to repair either of the roads: Rolle's Ab. tit. Chimin Common (B) 2, p. 390.

*E. H. Lloyd*, for the prosecution. In *Reg.* v. *Ramsden* (5), the Court, referring to the above passage in Rolle's Abridgment, pointed out that as it follows one relating to liability ratione clausuræ it relates to the same liability, which might be put an end to by the person in occupation who has the possessory right throwing down the inclosure. Even if the occupier is primarily liable ratione tenuræ, he can recover over against the owner: *Baker* v. *Greenhill* (6), and, therefore, the owner must be also liable, although no case can be cited where he has been convicted for non-repair. In *Rex* v. *Sutton* (7) the owner was indicted, but, being an infant in ward to a guardian in socage in possession, was acquitted. [He referred also to *Reg.* v. *Watts* (8); *Reg.* v. *Bucknell.* (9)]

As to the road in the first count: The liability to repair would have remained notwithstanding the creation of the turnpike trust, and the Act expressly preserved the common law liability. Its continuance is shewn by the provision in the General Turnpike Act 3 Geo. 4, c. 126, s. 110, that where a parish is indicted for non-repair of a turnpike road and a fine is imposed it shall be apportioned between the parish and the trustees.

Assuming that the road remains of the same kind, there is nothing to destroy the common law liability after the expiration

(1) 6 Mod. 163.
(2) 2 Camp. 455.
(3) 3 B. & Ad. 201
(4) 1 Mood. & Rob. 24.
(5) E. B. & E. 949.
(6) 3 Q. B. 148.
(7) 3 Ad. & E. 597.
(8) 1 Salk. 357.
(9) 7 Mod. 55.

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of the trust. But, even if the road is altered, the liability continues, as is shewn by s. 68 of the General Turnpike Act 4 Geo. 4, c. 95. The extent of the liability would be considered in adjusting the amount of fine. In the cases cited for the defendant, the Court recognised the existence of the liability pro ratâ, although the subject-matter of repair had been altered.

LORD COLERIDGE, C.J. This is an indictment against the defendant for not repairing a highway ratione tenuræ, and the second objection, which applies to both the roads, is that such an indictment must be preferred against the occupier of the land in respect of which the burthen of repairing ratione tenuræ is alleged to exist. The defendant is the owner and not the occupier of the land. From the date of Rolle's Abridgment to the present time, the placitum (B) 2, which lays down the law both in the affirmative and negative that you must indict the occupier and cannot indict the owner, has been unquestioned. The case cited in Rolle is a very strong one; for there it had been proposed to indict the owner, and the Court of King's Bench prohibited the proceeding, and did so on the express ground that the indictment for non-repair ratione tenuræ was laid against the owner and not against the occupier. That case has been accepted ever since. It has been said by learned judges in later cases that repetition does not strengthen, and in a certain sense that is true; but, under some circumstances, repetition does necessarily strengthen. If a dictum of Lord Coke is repeated by Lord Hale, and again by Lord Holt, and again by Lord Mansfield, in exactly the same words, the repetition very materially strengthens it. This passage in Rolle has been repeated by judges of high authority. It is plain, therefore, that this indictment being against the owner is wrong, and the conviction must be quashed on that ground. That difficulty would be overcome by indicting the occupier. But a graver question, and one which this Court ought not to shrink from deciding, is the real matter of controversy in this case, viz., whether any person is, under the circumstances, bound to repair the road now out of repair. The circumstances were these: There was an old road which ran in a serpentine course through

fields and commons, and such part of it as went through the land of Mr. Wood and his predecessors in title, they had, from time out of mind, repaired ratione tenuræ. Then came the Turnpike Act, giving to trustees certain powers of altering and widening the road, and it was very much altered by them. It having been a narrow paved road, they widened it, took up the paving stones, stopped and diverted a portion of it, and made it into a macadamized road. They probably much improved it, and I do not suggest that they exceeded their powers under the Act. The trust expired, the road became out of repair, and the defendant was indicted for not repairing ratione tenuræ. What are the principles of law to be applied? They are few and simple, and, when understood, make an end of the case. Primarily, no doubt, Turnpike Acts impose a special or statutory duty on the trustees or commissioners; but although, by the course of common law, those persons could be proceeded against for breach of their duty, the Acts do not destroy the common law liability existing in other persons before the Acts. They create a fresh liability in certain persons, but as regards the public preserve the liability as it was before. This was decided in *Rex* v. *Inhabitants of St. George's, Hanover Square* (1) by Lord Ellenborough, and has been the law ever since. The proceedings in that case were against the parish, but the principle is clearly applicable to all common law liability of the same kind as the liability of a parish to repair a road, and I apprehend that if there was a road of a mile in length, and the parish was bound to repair half a mile of it, and a private individual was bound ratione tenuræ to repair the other half-mile, the common law liability of the parish to repair the one half-mile and of the private individual to repair the other half-mile ratione tenuræ, would not be destroyed.

Such being the case it is reasonably clear that, although if the Turnpike Trustees had left this road as it was before, and then their powers had expired, the private individual would be liable for non-repair of that which he was bound to repair ratione tenuræ, yet the case is changed when the subject-matter of the liability is altogether destroyed. The road which he was bound

(1) 3 Camp. 223.

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to repair no longer exists. Its shape, termini, and character have been altered, properly enough, no doubt, but so as to destroy the liability of the private individual liable to repair ratione tenuræ, because that which he was bound to repair ratione tenuræ has disappeared. The road has gone and something else, different from what he was bound to repair, exists, and he is not bound to repair it, because his predecessors in title have not repaired it from time immemorial, and he is set free from liability. I base my decision of the point on that ground, first, because I believe it to be the true ground, and next, because I feel that if I were to decide it on the other ground—for which, however, some support is afforded by old cases, viz., that the person is only bound to repair so much of it as he was originally bound to repair—it would be extremely difficult to work out the principle in each particular case, and I do not think that it would really meet the law. It is said in Comyn's Digest (1), that if a parish is bound to repair it is not bound to pave. The duty is not to pave, but to repair, and a duty higher than that imposed by the common law cannot be insisted upon. The same principle would apply to persons liable to repair ratione tenuræ. That would dispose of a great deal of this case; but I prefer to put the decision on the broad ground which I have stated. I am therefore of opinion that both counts of the indictment are bad.

HAWKINS, MATHEW, DAY, and GRANTHAM, JJ., concurred.

Solicitors for the prosecution: *Cunliffes & Davenport.*
Solicitors for the defendant: *Tatham & Procter.*

(1) Tit. Chimin (A), Highway (A 4).

J. R.

ANDERSON, APPELLANT; HAMLIN, RESPONDENT.

1890
*April* 29

*Fishery Acts—Fresh Water Fishery—Enforcement of Act—Offence against Act—Board of Conservators—Exclusive Right to Prosecute—28 & 29 Vict. c. 121, s. 27, sub-ss. 2, 4, s. 35—36 & 37 Vict. c. 71, ss. 36, 62—41 & 42 Vict. c. 39, s. 7.*

The appellant was summoned for fishing without a licence, in a fishery district subject to a board of conservators, upon the information and complaint of the respondent, a duly appointed water-bailiff in the employment of the board. It was not proved that the respondent was authorized by the board to institute the proceedings:—

*Held*, upon a case stated by justices, that the penalty for the offence could only be recovered by the board of conservators, and therefore the respondent was not entitled to institute the proceedings, and the appellant was not liable to be convicted.

CASE stated by magistrates for the county of Somerset.

Upon the information and complaint of the respondent, a duly-appointed water-bailiff in the employment of the Avon, Brue, and Parret Fishery Board, the appellant was summoned for fishing within the Avon, Brue, and Parret fishery district for trout with a rod and line without a proper licence. The board of conservators for the district issued licences to persons fishing for trout within their district under s. 7 of the Freshwater Fisheries Act, 1878. At the hearing before the magistrates, the respondent, the water-bailiff, testified that he had received a letter from the clerk to the fishery board, directing him to institute the proceedings against the appellant, but did not produce the letter, and did not know whether the fishery board had met and passed any resolution authorizing the prosecution. It was contended on behalf of the appellant that the respondent could not prefer such information or complaint without proving a special authority from the board of conservators, and that under 28 & 29 Vict. c. 121, s. 27, sub-s. 4, the board of conservators were the only proper persons to take legal proceedings against the appellant. For the prosecution, it was contended that the respondent in his capacity as an officer of the board of conservators, and in his capacity as a constable acting within his

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bailiwick, required no special authority from the board to lay the information against the appellant, and that the summons was properly issued. The magistrates overruled the appellant's contention, and convicted him, being of opinion that the respondent had authority to prefer the information and complaint.

By the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), s. 27, "A board of conservators shall have power within their district to do the following things, or such of them as they may in their discretion think expedient; that is to say, . . . .

"(2.) To issue such licences for fishing as are provided by this Act. . . . .

"(4.) To take legal proceedings against persons violating the provisions of the Salmon Fishery Acts, 1861, 1865, or either of them."

By s. 35: "From and after a time to be appointed as aforesaid in a fishery district, any person fishing in that district with a rod and line for salmon without a proper licence shall be liable to a penalty."

The Salmon Fishery Act, 1873 (36 & 37 Vict. c. 71), s. 36, defines the powers of water-bailiffs, and by sub-s. 4: "For the enforcement of the provisions of the Salmon Fishery Acts, 1861 to 1873, every water-bailiff shall be deemed to be a constable, and to have all the same powers and privileges, and be subject to the same liabilities, as a constable duly appointed now has or is subject to in his constablewick by virtue of the common law of the realm or of any statute."

By s. 62: "All penalties imposed by the Salmon Fishery Acts, 1861 to 1873, or by any bye-law made in pursuance of this Act, and all sums of money, costs, and expenses by the said Acts, or either of them, directed to be recovered in a summary manner, may be recovered within six months after the commission of the offence, before two justices, in manner directed by" 11 & 12 Vict. c. 43, "or any Act amending the same. And all moneys received and penalties recovered under the said Acts, or any of them, on the complaint of a board of conservators, or of any officer of or a person authorized by a board of conservators, shall be paid to the board of conservators for the district, to be applied by them for the purposes of the Salmon

Fishery Acts, 1861 to 1873 (unless the Court for some special reason otherwise order.)"

By the Freshwater Fisheries Act, 1878 (41 & 42 Vict. c. 39), s. 7, "In any fishery district subject to a board of conservators. the conservators shall have power to issue licences . . . . to all persons fishing for trout or char, and in the event of the power being exercised in any fishery district the provisions of . . . . s. 35 . . . . of the Salmon Fishery Act, 1865, . . . . shall, with respect to such district, be construed as if the words 'trout or char' were inserted throughout after the word 'salmon.'"

*J. A. Thorne*, for the appellant. The provisions of 36 & 37 Vict. c. 71, s. 62, with regard to the recovery and application of penalties, shew that prosecutions for offences against the Salmon Fishery Acts can only be instituted by, or with the express authority of, the board of conservators: *Rex* v. *Corden* (1); *Reg.* v. *Hicks*. (2)

The contention of the appellant is strengthened by the repeal, by 36 & 37 Vict. c. 71, s. 65, of 24 & 25 Vict. c. 109, s. 35, which contained different provisions as to the application of penalties.

[*James Paterson*, amicus curiæ, referred to *Reg.* v. *Cubitt*. (3)]

*Willis Bund*, for the respondent. On the true construction of 36 & 37 Vict. c. 71, s. 36, sub-s. 4, a water-bailiff is entitled to prosecute. Sect. 62, which points out how penalties are to be recovered, contains no words negativing the right of any person to institute proceedings.

*J. A. Thorne* replied.

LORD COLERIDGE, C.J. This case is not free from difficulty. It is the case of a conviction for an offence against the Salmon Fishery Acts of 1865 and 1873, and the Freshwater Fisheries Act, 1878, the offence being that of fishing for trout with a rod and line without a licence. By s. 27, sub-s. 2, of the Act of 1865, the conservators have power to grant licences for salmon fishing (extended by 41 & 42 Vict. c. 39, s. 7, to trout fishing), and, by s. 62 of the Act of 1873, all moneys received and penalties

(1) 4 Burr. 2279. (2) 4 E. & B. 633; 24 L. J. (M.C.) 94.
(3) 22 Q. B. D. 622.

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recovered under the Acts are to be paid to the board of conservators to be applied for the sustentation of the board. It is argued, on behalf of the appellant, that according to the true construction of the Acts the conservators are the only persons who can put the Acts in force. In the present case I do not much doubt that the bailiff was in fact authorized to take proceedings; but it is not made out by the evidence that he was so authorized, and, therefore, for the purpose of deciding this case, we must take it that there was no evidence that he was authorized. That would not matter if he had a common law jurisdiction to take proceedings; but the conservators are charged with the control of the fisheries, and the duty is imposed upon them of enforcing the law.

It is argued for the respondent that, because there are no express words negativing his right to prosecute, he is entitled to do so. By s. 62 of the Act of 1873 penalties may be recovered in a summary manner, and are to be paid to the conservators, and applied by them for the purposes of the Acts. The words are somewhat remarkable. It would make a difference whether there were any existing provision for the recovery of penalties. There was such a provision down to the commencement of the Act of 1873, in 24 & 25 Vict. c. 109, s. 35, and if that section had remained in force together with the Act of 1873, it would have rendered the argument based on s. 62 of the Act of 1873 very weak, and the meaning would have been ambiguous; but the provision as to recovery of penalties in the earlier Act is abrogated by s. 65 of the Act of 1873, the effect of which is to strengthen the argument that where the recovery of penalties is specially provided for they can only be recovered by the persons pointed out by the statute.

The case is not without authority. There is the decision in *Reg* v. *Hicks* (1), and in *Rex* v. *Corden* (2) it was held, where there were no negative and exclusive words, but the penalty was to go to a particular person, that this was a strong indication that the person to whom the penalty was to go was the only person to sue for it. These are two strong authorities for the contention that in such a case as the present the person who is to receive the

(1) 4 E. & B. 633; 24 L J. (M.C.) 94. (2) 4 Burr. 2279

penalty is the only person entitled to sue for it. The case of *Reg.* v. *Cubitt* (1) also is not without force as bearing on the present case. There the statute provided that "the provisions of this Act shall be enforced by sea-fishery officers," and we held that this meant that sea-fishery officers were the only persons who were entitled to prosecute. It is true that the statute on which that case arose deals with foreign as well as British fishermen, so that it is possible that diplomatic complications might arise if private individuals were permitted to undertake the enforcement of the statute; still the principle of construction applicable to the statutes in the two cases is the same.

For these reasons I am of opinion that the conviction cannot be upheld.

MATHEW, J. I am of the same opinion. The scope of the Act is to entrust extensive powers to the conservators, and to empower them to institute legal proceedings. According to Mr. Willis Bund's argument any stranger could prosecute for an offence against the Acts, the result of which would be that a prosecution might be undertaken by a person who could not pay costs if they were awarded against him. I agree that the true meaning of s. 62 of the Act of 1873 is that the penalty is to go exclusively to the conservators, and they are the only persons by whom it can be recovered.

*Conviction quashed.*

Solicitor for appellant. *W. H. E. Stone, for S. B. Cresswell, Taunton.*

Solicitors for respondent: *Torr, Janeways, Gribble, & Oddie, for Barham & Sons, Bridgwater.*

(1) 22 Q. B. D. 622.

P B H.

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May 23.

CLARK *v.* SONNENSCHEIN.

*Practice—Official Referee, Judgment of—Appeal—Power of Court to enter Judgment—Order* XXXVI., *r.* 52; *Order* XL., *r.* 10; *Order* LIX., *r.* 3

On appeal from an official referee who has ordered judgment to be entered for the plaintiff, a Divisional Court has power not only to set aside such judgment, but to enter judgment for the defendant.

MOTION to set aside the findings and judgment of an official referee, and to enter judgment for the defendants.

*Houghton*, in support of the motion.

*Channell, Q.C.*, and *Heather*, shewed cause.

1890. April 28. THE COURT (Vaughan Williams and Lawrance, JJ.) held, that the judgment of the official referee upon the facts was wrong, and that the defendants were entitled to judgment.

*Channell, Q.C.*, then argued that the Court had no power under Order LIX., r. 3, to enter judgment, and that there must be a new trial.

*Houghton*, in support of the motion, referred to Order XL., r. 10.

*Cur. adv. vult.*

May 23. The judgment of the Court was delivered by

VAUGHAN WILLIAMS, J. We have already stated that we think that the judgment of the referee is wrong in fact, and cannot be supported by the evidence. The question arises as to what judgment we ought to give. Can we order judgment for the defendants, or are we bound to remit the matter for rehearing before the referee, or can the Court, if satisfied that it has all the necessary materials before it, not only set aside the judgment ordered by the referee, but also order judgment for the defendants? We think we can. Originally, under the rules of 1875, the referee had no power to enter judgment, and *Dyke* v. *Cannell* (1) makes it clear, that under Order XXXVI., r. 52, the Court

(1) 11 Q. B. D. 180.

before judgment has power, on the motion of either party, and not merely in cases where the referee being in doubt has submitted a question to the Court, to decide any question referred to the referee on the evidence taken before him (see the judgment of Cave, J., at p. 183). Now, is this power of the Court inapplicable in cases where the referee has ordered judgment to be entered under the powers conferred on him by rule 50 of Order XXXVI? We think that the rule applies even though judgment has been ordered by the referee to be entered, and has been so entered accordingly. In the first place, it is plain, that although the judgment entered by order of the referee is in form the judgment of the Court which ordered the reference, yet the Divisional Court retain control over the judgment; for the motion to set aside the judgment is, in the Queen's Bench Division, to the Divisional Court; and we think that the meaning of this rule is not to limit in any way powers that the Divisional Court previously had under Order XXXVI., r. 52, but to prevent any doubt which might otherwise have arisen as to the power of the Divisional Court to review that which in form was its own judgment, and to negative the possible supposition, which might otherwise have arisen, that the appeal from the decision of the referee must be to the Court of Appeal.

Solicitors for plaintiff: *Heather & Sons.*

Solicitors for defendants: *Powell & Rogers.*

J. R.

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*June* 4.

[IN THE COURT OF APPEAL.]

IN RE EEDE.

*Practice—Appeal—Court of Appeal—Jurisdiction—"Criminal Cause or Matter"—Striking Solicitor off Rolls—Attorneys and Solicitors Act,* 1843 (6 & 7 *Vict. c.* 73), *s.* 32—*Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *ss.* 19, 47.

By s. 32 of the Attorneys and Solicitors Act, 1843, a solicitor who (inter alia) permits his name to be used in any action upon the account or for the profit of an unqualified person may upon complaint made be struck off the roll, and the unqualified person may be committed to prison for any term not exceeding one year.

An order having been made by a Divisional Court under the above section striking a solicitor off the roll:—

*Held*, that the order was not made in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and that the Court of Appeal had therefore jurisdiction to entertain an appeal by the solicitor from the order.

APPEAL from an order of a Divisional Court made under s. 32 of the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), by which the name of the appellant was ordered to be struck off the roll of solicitors for having permitted or suffered his name to be made use of in an action upon the account and for the profit of an unqualified person.

*Hollams*, for the Incorporated Law Society. There is a preliminary objection to the hearing of this appeal. The order of the Divisional Court is an order made in a criminal matter, and no appeal lies to this Court. The unqualified person is liable under the section to imprisonment, and if he is imprisoned for his offence he is a criminal prisoner: *Osborne* v. *Milman.* (1) As regards him, therefore, an order of the Divisional Court sending him to prison is an order in a criminal matter, and the unqualified person cannot appeal. Nor can the solicitor appeal; for the mere difference of the penalty in the case of the solicitor and the unqualified person cannot affect the nature of the offence, which has all the essential elements of a crime; it is committed by the

(1) 18 Q. B. D. 471.

two in combination, and is as much a crime when committed by the one as by the other. The order is not made by the Court in the exercise of its disciplinary jurisdiction over solicitors, but is an order made under statutory powers in a criminal matter.

[He also cited *In re Lamb.* (1)]

*Willis, Q.C.*, and *Pollard*, for the appellant, were not called upon.

LORD ESHER, M.R. I have no doubt whatever that this preliminary objection must be overruled. The legislature when framing the Act knew perfectly well that the Court was in the habit of exercising its disciplinary power over solicitors as officers of the Court, and that when necessary that power was enforced by striking the solicitor off the rolls; and it is clear that it was not then considered that in so doing the Court was dealing with a criminal matter. The section recognized this power, and after doing so went on to deal with the unqualified person, a person who could not be brought under the disciplinary power of the Court at all; he was therefore treated as a criminal, not as a person subject to the disciplinary power, and was made liable to be sent to prison. It is easy to see that that punishment inflicted on the unqualified person must be in a criminal matter; but the Act obviously draws a clear distinction between the two cases, and in the case of the offending solicitor leaves him to be dealt with by the Court in the manner in which it had always dealt with him, by striking him off the rolls.

LINDLEY, L.J., concurred.

*Objection overruled.*

The appeal was subsequently heard upon the merits and was dismissed.

Solicitors for appellant: *Burgess & Cosens.*

Solicitor for Incorporated Law Society: *E. W. Williamson.*

(1) 23 Q. B. D. 477.

W. J. B.

1890
*June* 9.

IN RE AN ARBITRATION BETWEEN GALLOP AND THE CENTRAL QUEENSLAND MEAT EXPORT COMPANY, LIMITED.

*Practice—Award—Notice of Motion to set aside—Time—"Application"—Order* LXIV., *r.* 14; *Order* LII., *r.* 1.

By Order LXIV., r. 14, "an application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties."

By Order LII., r. 1, "where by these rules any application is authorized to be made to the court or a judge, such application, if made to a divisional court or to a judge in court, shall be made by motion."

An award was made and published on February 27. Notice of motion to set it aside was served on May 20. The motion did not appear in the day's list for hearing during the Easter sittings, which ended on May 23, but came on to be heard afterwards:—

*Held*, that the notice of motion having been given before the last day of the sittings next after the award, the "application" was within the time prescribed by Order LXIV., r. 14, and the motion was, therefore, not too late.

MOTION to set aside an award.

The award was made and published on February 27, 1890. Notice of motion to set it aside was dated and served on May 20. On May 23, the last day of the Easter Sittings, an application was made to a Divisional Court to extend the time for moving, although the case was not in the list of motions for that day. The Court granted the application, subject to any objection which might be raised thereafter. The time was afterwards extended by order of a master in chambers.

*Pollard*, moved in pursuance of the notice.

*Vennell*, objected that the appeal was out of time.

*Pollard*, in support of the motion. Formerly the application for a rule nisi to set aside an award had to be made before the last day of the term after the publication of the award. But the statutory provisions as to the time for moving to set aside an award are repealed by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 26, sched. 2, and now by Order LXIV., r. 14, "an application to set aside an award may be made at any time before the last day of the sittings next after such an award has been made and published to the parties." The application must be by motion, which has to be set down in a list, and it is impossible to ensure

that the motion shall be heard in time. The party could do no more than give notice of motion in time. The time for moving was extended by a master in chambers, and his order has not been appealed against.

[CHARLES, J., referred to *Smith* v. *Parkside Mining Co.* (1), and *In re Corporation of Huddersfield* v. *Jacomb.* (2)]

*Vennell*, in support of the objection. This arbitration, although not in an action, is no doubt subject to the Arbitration Act, 1889, repealing the 9 & 10 Wm. 3, c. 15, s. 2. But no provision is made in the new Act as to the time for moving to set aside an award. The motion must be made within the time specified in Order LXIV., r. 14, that is, before the last day of the sittings next after such award has been made and published. Even assuming that the motion was duly made on May 23, it was then too late.

DENMAN, J. In my opinion, this preliminary objection fails. The notice of motion was given on May 20, and therefore within the time allowed by Order LXIV., r. 14, for an application to set aside an award. If the notice was an "application" within the meaning of rule 14, it was in time. Applying the ratio decidendi of *Smith* v. *Parkside Mining Co.* (1), and *In re Corporation of Huddersfield* v. *Jacomb* (2), I think that in this case the "application" really was the commencement of the complaint. That is, in my opinion, what was intended in Order LXIV., r. 14, as the "application." The only difficulty in putting this construction on rule 14 arises from Order LII., r. 1, which provides that, "where by these rules any application is authorized to be made to the Court or a judge such application, if made to a Divisional Court or to a judge in Court, shall be made by motion." It might seem, at first sight, from the terms of that rule, that the "application" and "motion" were one. But it is not necessary so to decide. Order LII., r. 1, does not say that for all purposes the words "application" and "motion" shall be identical, and mean the same thing. The "application" may be "made by motion," and yet be complete enough within Order LXIV., r. 14, and a sufficient "complaint" within the mean-

(1) 6 Q. B. D. 67. (2) Law Rep. 17 Eq. 476; Law Rep. 10 Ch. 92.

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Denman, J.

ing of the cases on the old Act for the purpose of launching a motion to set aside the award. I think that the two sections, although not easy to reconcile, may, perhaps, be reconciled in that way, viz., by deciding that the step had been taken before the last day of the sitting which is the first step which can be reasonably called an "application" to set aside the award. I think, therefore, no extension of time was necessary. It may be that there is power to extend the time. I do not, however, rely on the power of extension; but I think that on the true construction of the rules and the decided cases we may hold, that, in the present case, the applicant is in time by reason of the notice of motion given on May 20.

CHARLES, J., concurred.

*Objection overruled.*

Solicitor for plaintiff: *H. C. Barker.*

Solicitors for defendant: *Freshfields & Williams.*

J. R.

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*June 19.*

[IN THE COURT OF APPEAL.]

T. W. HOBBS & CO., LIMITED *v.* HUDSON AND OTHERS.

*Practice—Interrogatories—Penal Action—Fraudulent Removal of Goods by Tenant—Action for Double Value—*11 *Geo.* 2, *c.* 19, *s.* 3.

An action for double the value of goods fraudulently removed by a tenant, brought under 11 Geo. 2, c. 19, is a penal action, and the plaintiff is not entitled to administer interrogatories to the defendant.

APPEAL of the plaintiffs from an order of a Divisional Court refusing to allow interrogatories to be administered to the defendants.

The action was brought under 11 Geo. 2, c. 19, s. 3, to recover double the value of goods alleged to have been fraudulently removed by one of the defendants, who was a tenant of the plaintiffs, in order to avoid a distress, the other defendant being charged with assisting in the removal. After delivery of the defence interrogatories were administered to the only defendant who appeared (the tenant not appearing), and objection was taken that, as the plaintiffs were a joint stock company, leave to administer interrogatories was necessary, and application was

made to strike out those that had been delivered. On the argument, it was agreed to treat the case as if it were an application to administer interrogatories, and the Court (Grantham and Charles, JJ.) ultimately refused leave, on the ground that the action was penal.

The plaintiffs appealed.

*W. Graham*, in support of the appeal. The action is not penal, for the recovery of double the value of the goods removed is not in the nature of a penalty imposed on the tenant, but of compensation to the landlord, to whom the statute gives a civil remedy. The case falls within the principle of *Adams* v. *Batley* (1), where it was held that a statute, which made a person who infringed a right to the sole liberty of performing a dramatic piece liable to a payment not exceeding forty shillings for each infringement, did not impose a penalty on the offender, so as to preclude the plaintiff from administering interrogatories. It is true that the present case is not distinguishable from *Jones* v. *Jones* (2), which decided that an action to recover treble damages for pound breach was penal; but it is submitted that case was wrongly decided, and should be overruled. *Martin* v. *Treacher* (3) was an action by a common informer, and in such actions the sum recovered is necessarily a penalty. Under s. 4 of the Act a power is given to imprison in certain cases; but the imprisonment is a penalty, not for removing the goods, but for disobeying the order of the justices as to payment.

*Jelf, Q.C.*, and *H. E. Duke*, for the defendant, were not called on.

LORD ESHER, M.R. I think the decision in *Jones* v. *Jones* (2) was right, and that what we have to say here is whether this is a penal action. In *Martin* v. *Treacher* (3) the action was by a common informer for penalties, and this was treated in the judgment of this Court as a penal action. In the present case the Act entitles a landlord to recover, not merely from a tenant who fraudulently removes goods, but from any person who aids or assists the tenant in his fraud, double the value of the goods carried off or concealed. I cannot entertain a doubt that this is imposing a penalty, and not merely giving compensation. I

(1) 18 Q. B. D. 625. (2) 22 Q. B. D. 425. (3) 16 Q. B. D. 507.

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HOBBS & CO. v HUDSON.

think, therefore, the decision appealed against was right, and that the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The application before us is by the plaintiffs in the action for leave to administer interrogatories to the defendants, and in support of it we are asked to say that this is not a penal action, but one brought to recover compensation. On examination of the Act it seems to me clear that it is a penal statute. We find in s. 3 that not merely the tenant, but any person aiding or assisting him in the fraudulent removal or concealment of the goods and chattels of the tenant, is to be liable for double the value of the goods carried off or concealed. This certainly points to a penalty, and not to compensation, and this view is strengthened by the provisions of s. 4, by which, if the goods do not exceed 50*l.* in value, recourse is to be had to justices, who may order the offender to pay double value, and in default commit him to the house of correction for six months with hard labour, unless the order is sooner satisfied. Mr. Graham offered to waive the penalty, and so remove the objection to the discovery he seeks to obtain: but if he waives the penalty no cause of action is left, and no discovery can be of any avail. I think, therefore, this is not a case in which interrogatories can be administered, and that the appeal should be dismissed.

LOPES, L.J. I think that *Jones* v. *Jones* (1) was rightly decided, and that, as it was a fixed principle of procedure in equity to refuse a bill of discovery in aid of a penal action, interrogatories cannot be administered in such an action. I am also clearly of opinion that the statute imposes a penalty, and does not merely give compensation. Under these circumstances I have no doubt the refusal of leave to administer interrogatories in this case was right, and that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Bonner, Wright, Thompson, & Co.*
Solicitors for defendants: *Law & Worssam.*

(1) 22 Q. B. D. 425.

A. M.

## PURE SPIRIT COMPANY *v.* FOWLER.

1890
*June* 23.

*Practice—Security for Costs—Action by Company in Liquidation—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 69.

A shareholder in a company sued the company in the Chancery Division to set aside a contract on the ground of fraud in the prospectus. While this action was pending the company sued the shareholder in the Queen's Bench Division for calls. The company was in liquidation. The shareholder applied for an order that the company should give security for costs in the action for calls:—

*Held*, that the fact that the company was in liquidation shewed, in the absence of evidence to the contrary, that there was reason to believe that if the defendant should be successful in his defence the assets of the company would be insufficient to pay his costs, and therefore the defendant was entitled to security for costs under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 69.

APPEAL by the defendant from the order of Lawrance, J., at chambers, affirming the decision of the master, who had refused to make an order that the plaintiff company should give security for the costs of the action.

The defendant in the present action, who was a shareholder in the plaintiff company, had commenced an action in the Chancery Division against the company to set aside a contract on the ground of fraud in the company's prospectus. While that action was pending the company commenced the present action for calls. A meeting of the company had been held, at which a resolution had been passed, "That in the opinion of the meeting the company, by reason of its liabilities, cannot continue its business, and that the company be wound up voluntarily." The company had accordingly gone into liquidation.

*J. Henderson*, for the defendant, in support of the appeal. The fact that the plaintiff company is in process of winding-up is enough of itself to bring the case within s. 69 of the Companies Act, 1862 (25 & 26 Vict. c. 89), for it gives reason to believe that the assets will be insufficient to pay the defendant's costs if he succeeds: *Washoe Mining Co.* v. *Ferguson* (1); *Accidental and Marine Insurance Co.* v. *Mercati* (2); *City of Moscow Gas Co.* v.

(1) Law Rep. 2 Eq. 371. (2) Law Rep. 3 Eq. 200.

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PURE SPIRIT COMPANY v. FOWLER.

*International Financial Society* (1); *Northampton Coal, Iron, and Waggon Co.* v. *Midland Waggon Co.* (2)

*Alfred Lyttelton*, for the plaintiff company. Sect. 69 of the Companies Act, 1862, provides that a judge "may" order security for costs to be given. The making or refusal of the order is therefore a matter of discretion, and, the master and the judge having both exercised their discretion in the same way, the Court should not interfere: *Western of Canada Oil, Lands and Works Co.* v. *Walker*. (3)

[CHARLES, J., referred to *Julius* v. *Lord Bishop of Oxford*. (4)]

These are in substance cross actions, and in such a case security for costs ought not to be ordered.

DENMAN, J. I have come to the conclusion that the present case is one in which security for costs ought to be given. The defendant in the second action originally sued the Pure Spirit Company for fraud. He has not prosecuted that action with diligence, perhaps for the reason that he did not think it was worth his while to do so. Then an action is brought against him by the company for calls, and he applies for an order that the company shall give security for costs under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 69, by which, "Where a limited company is plaintiff or pursuer in any action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

I am of opinion that the fact that a company is in liquidation forms of itself a reason to believe that the assets of the company will be insufficient to pay the defendant's costs.

In *Northampton Coal, Iron, and Waggon Co.* v. *Midland Waggon Co.* (2), Jessel, M.R., said: "The next point is, are they entitled to such security? Well, the Companies Act, 1862, s. 69, says that where a limited company is plaintiff, any judge having

(1) Law Rep. 7 Ch. 225.
(2) 7 Ch. D. 500.
(3) Law Rep. 10 Ch. 628.
(4) 5 App. Cas. 214.

jurisdiction in the matter may, 'if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs,' require sufficient security to be given for such costs. I should say that the fact of the plaintiff company being in liquidation would be sufficient 'reason to believe' the assets to be insufficient, unless evidence to the contrary was given." (1) That, in my opinion, is decisive of the question, for the expression "I should say" is substantially equivalent to "I do say," and it is not a mere dictum. In the present case there is no evidence to the contrary. Then the Master of the Rolls continued: "It appears to me, therefore, that the appellants are entitled to what they ask." (1)

This passage shews that that case is really a decision that the fact of the company being in liquidation is in itself a primâ facie reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, and therefore, if in the present case I thought we had a discretion, I should be prepared to follow the view expressed by the Master of the Rolls in the passage which I have read; but I think the case goes further than this, for in my opinion it shews that the Court is bound to order security for costs where the company is in liquidation, and there is no evidence to rebut the inference that the assets will be insufficient to pay the defendant's costs if he succeeds. In that case James, L.J., gave judgment as follows: "I am of the same opinion. With regard to the question as to our entertaining the appeal, I may say that this is not like an appeal from an order as to some preliminary proceedings for putting a case in train for trial. As to such matters it is very important that appeals should be strictly kept down, because they only involve both parties in great and unnecessary expense. But I consider security for costs to be ex debito justitiæ, and it is a very important matter whether a suitor is likely, if successful, to be able to obtain payment of his costs. Therefore I think he is as much entitled to appeal in a case of that kind as upon any other case." (2)

In that judgment the Lord Justice practically says that it is

(1) 7 Ch. D., at p. 503. (2) 7 Ch. D., at pp. 503, 504.

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Denman, J.

not a mere matter of discretion. The case is a strong authority for the proposition that there is no discretion where the circumstance exists which admittedly exists in the present case, namely, that the company is in liquidation, and there is nothing to shew that the assets will be sufficient. On this ground also I am of opinion that security for costs ought to be given.

CHARLES, J. I am of the same opinion. The last case which has been referred to—*Northampton Coal, Iron, and Waggon Co.* v. *Midland Waggon Co.* (1)—is an authority for the proposition that where a company is in liquidation this fact gives sufficient reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs.

In the present case there are no special circumstances to rebut the inference that the assets will be insufficient, and therefore the present case comes within the terms of s. 69 of the Companies Act, 1862. Without saying that in all cases s. 69 is absolutely imperative, still I think that, where there are no special circumstances to shew the contrary, the Court should exercise its discretion by ordering security for costs to be given. In the case to which I have referred, James, L.J., substantially repeats his previous observation in the case of *City of Moscow Gas Co.* v. *International Financial Society.* (2). In that case an attempt was made to escape an order for security for costs on the ground that the plaintiffs' bill was a cross bill. In the present case also it is contended that the action brought by the company is a cross action; but I do not think that these are cross actions, for in the action in the Chancery Division the company could not set up their claim for calls as a defence to the action. I do not see, therefore, how these can be said to be cross actions; but even if they are, I am of opinion that the case of *City of Moscow Gas Co.* v. *International Financial Society* (2) is in point; for the Master of the Rolls there said that security for costs ought always to be ordered where the company is in liquidation, and there is nothing to shew that the assets will be sufficient to pay the defendant's costs if he is successful, and in that case, even though there were cross bills, he ordered security for costs to be given, and on

(1) 7 Ch. D. 500. (2) Law Rep. 7 Ch. 225.

appeal, James, L.J., took the same view. I do not say that there is no discretion in any case; but I am of opinion that in the case now before the Court we are bound to make an order for security for costs.

*Appeal allowed.*

*Order made for security for costs.*

Solicitors for plaintiffs: *Johnson, Budd, & Johnson.*

Solicitors for defendant: *Merrick & Co.*

P. B. H.

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## HUME *v.* SOMERTON.

*June 17.*

*Practice—Writ issued before Judicature Acts—Renewal without Leave—Common Law Procedure Act,* 1852 (15 & 16 *Vict. c.* 76), *s.* 11—*Repeal*—46 & 47 *Vict. c.* 49—*Judicature Acts and Rules, Order* VIII., *r.* 1.

Order VIII., r. 1, as to the renewal of writs, applies to writs issued before as well as after the Judicature Act, 1875, and subsequently renewed. Where, therefore, a writ issued in 1861 was renewed in the manner prescribed by the Common Law Procedure Act, 1852, s. 11, until 1890, when it was served, no leave of a Court or judge to renew it having been obtained under Order VIII., r. 1:—

*Held*, that the writ was no longer in force, and the service must be set aside.

MOTION to set aside the service of a writ, on the ground that it was no longer in force.

1890. June 9. *Sir C. Russell, Q.C.*, and *A. T. Lawrence*, for the defendant, in support of the motion.

*Philbrick, Q.C.*, and *W. English Harrison*, for the plaintiff, shewed cause.

*Cur. adv. vult.*

The facts and arguments sufficiently appear in the following judgment of the Court (Denman and Charles, JJ.) delivered by

June 17. CHARLES, J. In this case an application was made to us that the service of the writ of summons on the defendant might be set aside on the ground that the writ was at the date of the service no longer in force. It was originally issued on April 6, 1861, and it was proved to our satisfaction that it had been regularly renewed in the manner prescribed by the Common Law Procedure Act, 1852, s. 11, down to March 5, 1890. Shortly

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Charles, J

after the last-mentioned date it was served on the defendant. The question now raised is, whether the plaintiff can rely on the provisions as to renewal contained in the Common Law Procedure Act, 1852, s. 11, or whether he is not bound by the provisions of Order VIII., r. 1, of the Rules of the Supreme Court, 1883. If that rule applies, the service of the writ ought to be set aside, for writs of summons which come within its purview can only be renewed by order of the Court or a judge, and in this case no such order has been obtained. If, on the other hand, the earlier statute applies, the service was regular, inasmuch as under the terms of the 11th section a plaintiff was at liberty to renew a writ of summons without leave. The section is as follows: "No original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date; but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal, bearing the date of the day, month, and year of such renewal, such seal to be provided and kept for that purpose at the offices of the masters of the . . . Superior Courts, and to be impressed upon the writ by the proper officer of the Court out of which such writ issued, upon delivery to him by the plaintiff or his attorney of a præcipe in such form as has heretofore been required to be delivered upon the obtaining of an alias writ; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons." There is no limit, it will be observed, placed upon the number of renewals which might be made, nor was it necessary for the plaintiff to shew that he had made reasonable efforts to serve the defendant. His right to renew appears to have been absolutely unrestricted, and if the statute had still been in force and applicable to the plaintiff's case, it would have been difficult to hold that the mere frequency of the successive renewals, or the fact of their having been made during a period in which the defendant might have

been served, constituted in themselves an abuse of the process of the Court. But the Act of 1852 was repealed by 46 & 47 Vict. c. 49, contemporaneously with the coming into operation of the Rules of 1883. The preamble of the Act declares that "it is expedient that various enactments, mentioned in the schedule . . . which chiefly relate to civil procedure, or matters connected therewith, and which may be regarded as spent . . . or the subject-matter whereof is provided for by or under the Supreme Court of Judicature Act, 1873, and the Acts amending it, or rules made pursuant thereto . . . be now expressly and specifically repealed"; and s. 3 provides that "the enactments described in the schedule to this Act are hereby repealed, subject to the exceptions and qualifications mentioned in this Act, and in that schedule." In the schedule is the Common Law Procedure Act, 1852, except certain portions of it not material to the question now before us. Sect. 5 enacts that the repeal effected by the Act shall not affect (amongst other things) (*a*) anything done or suffered before the passing of this Act under any enactment repealed by this Act; or (*b*) any jurisdiction or principle or rule of law or equity established or confirmed, or right or privilege acquired, or duty or liability imposed or incurred, or compensation secured by or under any enactment repealed by this Act. And it is contended that these words keep the Common Law Procedure Act, 1852, s. 11, alive, so far as regards writs issued prior to the Judicature Acts coming into operation. But we cannot come to that conclusion. The rules under the Judicature Act and this statute ought, we think, to be read together, and, having regard to the language of the rules, we are unable to hold that, notwithstanding the repeal of the Act of 1852, the plaintiff can still act, in a matter of civil procedure, under its provisions. It was not, in our opinion, a right or privilege acquired within the meaning of s. 5. The rules, therefore, are the only authority under which writs can be renewed, and, unless they can be applied to writs issued prior to the Judicature Acts, as well as to those issued since, there is no authority at all for the renewal of the former class of writs. For since October 24, 1883, when the rules and 46 & 47 Vict. c. 49, came contemporaneously into operation, Order LXXII., r. 2, cannot be relied on. That rule

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Charles, J

provides that "where no other provision is made by the Acts or these rules, the present procedure and practice remain in force." As Cotton, L.J., points out in *In re Busfield* (1), even if no other provision is made, it is difficult to hold that this rule keeps on foot any practice or procedure contained in a repealed statute. "No suitor," says Mellish, L.J., in *Republic of Costa Rica* v. *Erlanger* (2), "has any vested interest in the course of procedure. . . ." But we do not decide this case on that ground, because we have come to the conclusion that Order VIII., r. 1, does make provision for writs prior to as well as after the Judicature Act. The prefatory note provides that the rules shall apply, unless otherwise expressly provided, so far as may be practicable, to all proceedings taken on or after October 24th, 1883, in all causes and matters then pending. There is no such express provision, for whatever may be the construction to be placed on Order LXXII., r. 2, it certainly is not an express provision. Then Order VIII., r. 1, enacts that "no original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to the Court or a judge for leave to renew the writ; and the Court or judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the original or concurrent writ of summons be renewed for six months from the date of such renewal inclusive, and so from time to time during the currency of the renewed writ. . . . And a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons." It is contended that these words, which are, it may be observed, a repetition of the words used in the rules of 1875, do not apply, and cannot be construed to include writs issued prior to the coming into operation of the Judicature Acts. The form of the writ under the Judicature Act is prescribed by Order II., r. 3, and the form, which has the same parliamentary authority as the rules

(1) 32 Ch. D. 123. (2) 3 Ch. D. 62, at p. 69.

(see Judicature Act, 1873, s 100), indicates a twelve months' and not a six months' writ. The writ in the present case is, of course, a six months' writ. But although it is a six months' writ and in other respects in the form prescribed by the schedule of the Common Law Procedure Act, 1852, it is none the less an "original writ of summons." The words are wide enough in our opinion to include all writs of summons, and therefore, if we had been considering the matter in the interval between the coming into operation of the Judicature Act and the repeal of the Common Law Procedure Act, 1852, we should have held that the rule was applicable. But since the repeal of the Act, 1852, we consider it clear that the rules as to renewals form a complete code on the subject of renewal, just in the same manner as the rules as to service out of the jurisdiction form a complete code on that subject: see *In re Busfield* (1), and that they are capable of being read and should be read as applicable to all writs of summons whenever issued.

This construction of the rule is opposed to the prevailing practice. The practice masters, acting, we presume under Order LXI., s. 2, have at some period between 1880 and 1888 issued a direction that "writs of summons before the Judicature Acts came into force may be renewed without an order." This direction, however, has no statutory authority. It cannot in our judgment be treated as a direction of the Court under the Judicature Act, 1873, s. 22, and even if it could, it cannot control the Rules of Court of 1883, which have parliamentary authority and are expressly made applicable to pending proceedings. For the reasons above given, therefore, we think that on the coming into operation of the Judicature Act, 1875, and the rules, the rule as to renewals applied to all writs whether issued before or after the Act. This being so, Order LXXII., r. 2, does not apply. We further think that even if we are mistaken in our construction of Order VIII., r. 1, that Order LXXII., r. 2, cannot be relied on by the plaintiff, the Common Law Procedure Act, 1852, now being repealed, and there being no words in the repealing statute sufficient to keep on foot for the plaintiff's benefit the unrestricted power of renewing this writ without an order.

(1) 32 Ch. D. 123.

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We should add that the defendant has not in our opinion waived the irregularity, and accordingly we order the service of this writ to be set aside with costs.

Solicitor for plaintiff: *Dalston.*

Solicitors for defendant: *Tatham & Procter.*

J. R.

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*June* 12, 24

MOORE AND ANOTHER *v.* GAMGEE.

*County Court—Practice—Prohibition—Want of Jurisdiction—Action in wrong Court—Appearance by Defendant—Waiver of Objection—County Courts Act,* 1888 (51 *&* 52 *Vict. c.* 43), *ss.* 74, 114.

The plaintiffs commenced an action against the defendant in a county court, within the district of which the defendant had carried on business within six months before the commencement of the action, but did not dwell or carry on business at the time of commencing the action. Leave to sue in that Court had not been obtained. The defendant appeared, and the case was heard and partly determined and adjourned to a future day. At the second hearing the defendant for the first time objected to the jurisdiction of the Court. The judge held that the defendant, by appearing and contesting the action, had waived the objection. The defendant applied for a prohibition:—

*Held*, that the objection to the jurisdiction was one which could be waived, and that the defendant had waived it, and was not entitled to a prohibition.

*In re Jones* v. *James* (19 L. J. (Q. B.) 257) followed.

APPLICATION by the defendant for a prohibition directed to the judge of the County Court of Surrey, holden at Farnham, to prohibit the proceedings in an action brought by the plaintiffs against the defendant in that Court.

The defendant did not dwell or carry on business within the district of the Court. He had carried on business within the district within six months before the commencement of the action; but the plaintiffs had not obtained leave to commence the action within the district, as required by the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74. (1)

(1) By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 74: "Except where by this Act it is otherwise provided, every action or matter may be commenced in the Court within the district of which the defendant, or one of the defendants, shall dwell or carry on his business at the time of commencing the action or matter, or it may be commenced, by leave of the judge or registrar, in the Court within the district of which the defendant or one of the defendants dwelt or carried on business, at any time within six

The action was brought to obtain specific performance of a contract by the defendant to purchase certain leasehold property, and the plaintiffs also claimed payment of the purchase-money and interest, and a lien on the premises until payment. The defendant appeared by a solicitor, and on the first day on which the case was heard no objection was taken to the jurisdiction of the Court. The judge found that the contract was proved, and pronounced a decree for specific performance. He then reserved for hearing on a future day the question whether the title had been accepted by the defendant or required to be proved. At the hearing on the second day, the solicitor for the defendant for the first time took the objection that the Court had no jurisdiction to entertain the action, on the ground that the defendant did not dwell or carry on his business within the district of the Court at the time of the commencement of the action, and no leave had been obtained to bring the action in that Court. The judge held that the defendant, by appearing and contesting the action, had waived the objection, and proceeded with the hearing.

June 12. *Wedderburn*, for the defendant, in support of the application for a prohibition. The county court has no jurisdiction except what is conferred upon it by statute, and the jurisdiction to entertain an action where the defendant resides out of the jurisdiction depends entirely on s. 74 of the County Courts Act, 1888, and therefore is conditional on leave having been obtained. The objection was taken as soon as the defendant's solicitor became aware of the want of jurisdiction.

[CAVE, J. The only question is whether the objection is one which can be waived. If it can, there is abundant evidence that the defendant did in fact waive it.

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calendar months next before the time of commencement, or, with the like leave, in the Court in the district of which the cause of action or claim wholly or in part arose."

By s. 114: "Whenever an action or matter is commenced over which the Court has no jurisdiction, the judge shall, unless the parties consent to the Court having jurisdiction, order it to be struck out, and shall have power to award costs in the same manner, to the same extent, and recoverable in the same manner, as if the Court had jurisdiction therein and the plaintiff had not appeared, or had appeared and failed to prove his demand or complaint."

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A. L. SMITH, J., referred to *Mayor of London* v. *Cox* (1).]

The judge was bound by s. 114 to dismiss the action. *Broad* v. *Perkins* (2) is distinguishable, for there final judgment had been given.

*Gregson*, for the plaintiffs. The merits are with the plaintiffs, and the objection comes too late, for it was not taken until after a decree for specific performance had been pronounced. The objection was waived. The facts were within the knowledge of the defendant, and he seeks to rely upon his ignorance of the law. The case may, perhaps, be within s. 75, and not s. 74, and if there is any doubt as to the jurisdiction, the Court will not interfere: *Taylor* v. *Nicholls* (3), per Brett, J. Sect. 114 of the Act applies only to those cases that are within s. 56—that is, libel, slander, seduction, and breach of promise of marriage, where the Court has no jurisdiction over the subject-matter of the action. *Broad* v. *Perkins* (2) is an authority in favour of the plaintiffs.

*Wedderburn*, replied.

*Cur. adv. vult.*

June 24. CAVE, J. This is an application by the defendant for a prohibition to the county court judge, on the ground that he had no jurisdiction to hear and determine the action. The plaintiffs sought to obtain an order for the specific performance of a contract. On behalf of the defendant it was contended that, because the defendant did not dwell or carry on his business within the jurisdiction of the Court, and no leave had been obtained to commence the action, as required by s. 74 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), therefore the judge was bound, by s. 114 of the same Act, to dismiss the case. There are two senses in which it may be said that there is no jurisdiction to entertain an action—first, where under no circumstances can the Court entertain the particular kind of action, as in cases within s. 56 of the Act—that is, libel, slander, seduction, or breach of promise of marriage; secondly, there are the cases provided for by s. 74, where under certain circumstances leave can be given to bring an action which the Court could not otherwise entertain; in these cases there is no want of jurisdiction

(1) Law Rep. 2 H. L. 239. (2) 21 Q. B. D. 533.
(3) 1 C. P. D. 242.

over the subject-matter of the action, but leave is required in the particular case before the Court can entertain the action, and it is an objection, which may be taken to the hearing of the action, that the defendant does not dwell or carry on his business within the jurisdiction, and leave has not been obtained. In the present case the plaint was issued, and the case was heard, and partly decided, before the objection was taken. There is always some difficulty in drawing an analogy between proceedings in the High Court and proceedings in the county court, because the High Court has jurisdiction by the common law, whereas the jurisdiction of the county court is entirely created by statute; but there is some analogy between such a case as the present and a case in the High Court, where it is sought to serve a writ on a defendant who is resident abroad. In such a case in the High Court, if the defendant is served, and takes any step in the action, except moving to set aside the service, he waives the objection of want of jurisdiction, and cannot be heard; but a conditional appearance may be entered, which has not the effect of waiving the defendant's right to object to the jurisdiction. In my opinion the case is much the same in the county court. Part III. of the County Courts Act, 1888, is headed, "Jurisdiction and Law"; and Part IV., which includes s. 74, is headed "Procedure and Trial." It seems, therefore, that cases which are within s. 74 would come under the head of procedure rather than under the head of jurisdiction, although no doubt this Court would have power to issue a prohibition in a proper case. I think, therefore, that the objection to the jurisdiction of the Court may be waived by taking any step in the proceedings before applying to dismiss the action; and this view is borne out by a case which was not cited in argument: *In re Jones* v. *James.* (1) In that case the defendant, who had resided for five years out of the jurisdiction of the Cardiganshire County Court, in which the cause of action arose, was served with a summons issued out of the Cardiganshire County Court, and was at the same time served with an order of the judge of the county court, dated October 30, 1847, more than two years previously, granting leave to the plaintiff to issue a summons against the defendant.

(1) 19 L. J. (Q.B.) 257.

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Cave, J.

The defendant gave notice of his intention to rely upon the defence of the Statute of Limitations, and afterwards moved for a prohibition. In the course of the argument of the motion, Erle, J., said: "Where an inferior Court has no jurisdiction from the beginning, a party by taking a step in a cause before it does not waive his right to object to the want of jurisdiction. But jurisdiction is sometimes contingent; in such case, if the defendant does not, by objecting at the proper time, exercise his right of destroying the jurisdiction, he cannot do so afterwards." After taking time to consider, Erle, J., gave judgment in the following terms, discharging the rule: "This case is one over which the county court of Cardiganshire would clearly have jurisdiction if the order of the 30th of October be a valid subsisting order. But it is not necessary for me to decide whether that order be a valid subsisting order, or whether in fact any plaint had been entered before the order was granted, or whether in point of law a plaint be a condition precedent to the judge's authority to allow a summons to issue; for, according to my view of the law, the judge of the county court would have jurisdiction in the suit if the defendant proceeded in it without making the objection. Now it is shewn that, after having been served with the order and summons, the defendant appeared before the county court, and did what was equivalent to pleading by serving the clerk of the court with notice of his intention to defend himself by setting up the Statute of Limitations as a bar to the plaintiff's claim. Assuming, therefore, that the order be of doubtful validity, I am of opinion that, by thus coming in and pleading, the defendant has deprived himself of the power of examining minutely into the regularity of that process by which he was called upon to appear, and that as against him it must be considered as perfectly valid." That was a stronger case than the present, for there the defendant had been served with an order from which it appeared as if leave had been given, and from which he might have supposed that the leave of the judge had been duly obtained. In the present case no notice of leave having been obtained was served, and the defendant knew, as a matter of fact, that he lived out of the jurisdiction, and therefore he ought to have known, as a matter of law, that there was a

want of jurisdiction unless leave had been obtained. Moreover, he had done more in the present case, for he had appeared, and the case had been argued and partly decided before any objection was taken.

For these reasons, I am of opinion that the county court judge arrived at a right conclusion in holding that the defendant had waived the objection to the jurisdiction; and therefore this application for a prohibition must be refused with costs.

A. L. SMITH, J., concurred.

*Application refused.*

Solicitors for plaintiffs: *Wynne-Baxter & Keeble, for J. Streeter, Croydon.*

Solicitor for defendant: *R. Chapman.*

P. B H.

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## DIXON *v.* WELLS.

*May 8.*

*Adulteration—Jurisdiction—Complaint to Justice—Summons issued by another Justice—11 & 12 Vict. c. 43 (Jervis's Act), s. 1—38 & 39 Vict. c. 63 (The Sale of Food and Drugs Act, 1875), s. 6—42 & 43 Vict. c. 30 (Amendment Act, 1879), s. 10—Invalidity of Process—Appearance under Protest.*

By 11 & 12 Vict. c. 43, s. 1, in all cases where an information shall be laid before justices that any person has committed any offence within the jurisdiction of such justice or justices . . . and also in all cases where a complaint shall be made to any such justice or justices upon which he or they shall have authority by law to make any order for the payment of money or otherwise, then "it shall be lawful for such justice or justices to issue his or their summons directed to such person," requiring him to appear before a justice or justices to answer thereto.

By 38 & 39 Vict. c. 63 (The Sale of Food and Drugs Act, 1875), s. 6, "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty . . ." By s. 20 every penalty imposed by this Act shall be recoverable in the manner prescribed by 11 & 12 Vict. c. 43.

By 42 & 43 Vict. c. 30, s. 10, "in all prosecutions under 38 & 39 Vict. c. 63, and notwithstanding the provisions of s. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention to the terms of the principal Act the seller is liable

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to prosecution, and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned."

A complaint having been made to two justices of a borough against the appellant for an offence under the above Acts, a summons was signed and issued by another justice, who had not heard the complaint, and was served on the appellant. The appellant thereupon appeared before the stipendiary magistrate of the borough, but objected that the summons was invalid and the magistrate had no jurisdiction to hear the case. The magistrate being of opinion that the defect, if any, in the summons was cured by the appearance of the appellant, heard the case and convicted him:—

*Held*, that the summons, having been signed and issued by a justice who had not heard the complaint, was invalid; that the defect was not cured by the appearance of the appellant, as he appeared under protest; that the provisions of 42 & 43 Vict. c. 30, s. 10, were imperative, and not merely directory, and that as no summons had been duly served in accordance with them the magistrate had no jurisdiction, and the conviction was wrong.

CASE stated by the stipendiary magistrate for Kingston-upon-Hull, pursuant to 42 & 43 Vict. c. 49, s. 33.

A complaint was preferred by the respondent, who was an inspector under the Sale of Food and Drugs Acts, against the appellant, a farmer, before the stipendiary police magistrate for the borough of Kingston-upon-Hull, for that the appellant did, on September 20, 1889, at the said borough, unlawfully sell or deliver to the prejudice of the purchaser a certain article of food —to wit, a quantity of new milk—which was procured by the respondent at the place of delivery in the course of delivery to the purchaser and consigned in pursuance of a contract for sale to such purchaser, and which quantity of milk was not of the nature, substance, and quality of the article demanded by such purchaser, contrary to 38 & 39 Vict. c. 63, s. 6, and 42 & 43 Vict. c. 30, s. 3.

On the day fixed for the hearing of the complaint, (1) the appellant duly appeared before the stipendiary magistrate sitting as a Court of Summary Jurisdiction in answer to the summons, and was represented by his solicitor. The summons was, as a fact, signed by Edward Robson, Esq., one of the justices of the peace for the borough, and bore date October 14, 1889, and showed upon the face of it that complaint had been laid before the justice

(1) 23rd October, 1889.

personally on the date named. It was objected on behalf of the appellant that the summons was invalid, and that the Court in consequence had no jurisdiction to hear and determine the matter. It was admitted on behalf of the respondent that no complaint had been laid before the aforesaid justice on the day named, or on any day, but, on the contrary, it was admitted that the complaint had been laid before James Stuart, Esq., and T. W. Palmer, Esq., two justices of the peace for the borough, when sitting as a Court of Summary Jurisdiction at the borough on October 10, 1889, and that it was by them then granted but not signed. It was contended on behalf of the appellant that inasmuch as it was admitted that no complaint had been laid before the aforesaid Edward Robson, Esq., the summons was bad, and that the Court in consequence had no jurisdiction to hear and determine the complaint. It was admitted that the alleged irregularity or defect in the summons was unknown to the appellant prior to his appearance in court.

The stipendiary magistrate reserved the points raised on behalf of the appellant for future consideration, and proceeded to hear the evidence on the said complaint.

The facts adduced in evidence were practically undisputed. Having duly considered the points reserved, the magistrate was of opinion, even assuming there had been an irregularity or defect in the issuing of the summons, that the same was cured by the appellant's presence in court and by the absence of any proof or allegation that he had been misled, or of any request for adjournment, and therefore that he, the magistrate, had jurisdiction to hear and determine the complaint, and he convicted and fined the appellant.

The questions for the opinion of the Court were: (1) Whether there was an irregularity in the issue of the summons. (2) If there was, whether the same was cured by the appearance of the appellant in court on the day of hearing under the circumstances stated; and (3) Whether the magistrate had jurisdiction to hear and determine the matter.

*C. Montague Lush*, for the appellant. By 11 & 12 Vict. c. 43, s. 1, in all cases where an information shall be laid before one or

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more justices of the peace that any person has committed, or is suspected to have committed, any offence or act within the jurisdiction of such justice or justices, &c., "and also in all cases where a complaint shall be made to any such justice or justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise, it shall be lawful for such justice or justices of the peace to issue his or their summons . . ." No information or complaint in writing was necessary. When a complaint is made to a justice, "such justice" must issue "his summons." In this case the summons was not issued by the justices who heard the complaint, but by another justice, and was therefore irregular, and the magistrate who heard the case had no jurisdiction.

THE COURT called on

*H. T. Kemp*, for the respondent. The summons is mere process to bring the accused before the justices, and an irregularity is immaterial if he, in fact, appears. But the summons was not irregular. In practice the information or complaint is generally laid before the clerk to the justices, and a summons is signed by one of the justices. On the accused appearing to answer the charge, the magistrate had jurisdiction, even although there had been no information or summons: *Reg. v. Shaw* (1); *Reg.* v. *Fletcher* (2); *Reg.* v. *Hughes.* (3) The provisions of Jervis's Act for the purpose of bringing accused persons before justices are directory only, and do not affect the jurisdiction of justices to hear a charge made against a person who is before them of an offence within their jurisdiction. "In such a case," Hawkins, J., said, in *Reg.* v. *Hughes* (p. 629), "it is in my opinion altogether immaterial, so far as the jurisdiction of the justices to hear that charge is concerned, whether the accused was before them voluntarily or otherwise, or on legal or illegal process." *Blake* v. *Beech* (4), which may be cited for the respondent, turned on its special circumstances, as was explained in *Reg.* v. *Hughes.* (3) Irregularity in mere process which is not a condition precedent to jurisdiction does not invalidate the jurisdiction. It must be admitted that in the cases above cited the person accused did

(1) 34 L. J. (M.C.) 169.
(2) Law Rep. 1 C. C. R. 320.
(3) 4 Q. B. D. 614.
(4) 1 Ex. D. 320.

not object to the jurisdiction, whereas in the present case the defendant protested against it. But he voluntarily appeared before the magistrate, and made no request for an adjournment. Protest makes no difference: *Gray* v. *Commissioners of Customs.* (1) 42 & 43 Vict. c. 30 (the Sale of Food and Drugs Act (Amendment Act), 1879), s. 10, provides that the summons under that Act shall be served within twenty-eight days in case of a perishable article, and the service on the appellant was within that time. But a summons was not necessary, as the appellant appeared, and the magistrate had jurisdiction over the charge. His jurisdiction did not depend on process, but on the time, place, and circumstances of the alleged offence.

*C. Montague Lush*, for the appellant. The principle of the decision in *Reg.* v. *Hughes* (2) is, that if a person, being before justices, however he may be brought there, chooses to give them jurisdiction on the chance of obtaining their decision in his favour, he cannot afterwards object that they had no jurisdiction. But the appellant did not waive the objection to the jurisdiction. The Sale of Food and Drugs Act (Amendment Act), 1879, was more stringent against offenders than the principal Act of 1875, and therefore s. 10 was inserted for their protection, and enacts that the summons shall in a case of a perishable article be served within twenty-eight days. The argument for the respondent is, in effect, that an invalid summons is equivalent to no summons, and if the accused appears he may be convicted, perhaps a year after the alleged offence and when the subject-matter of the complaint has perished. But the Amendment Act was passed after the decision in *Reg.* v. *Hughes* (2), and s. 10 is an additional provision to those of Jervis's Act, and renders a valid summons in conformity with the section essential to the jurisdiction of the magistrate. That decision cannot be reconciled with several other cases on the subject. In *Blake* v. *Beech* (3), the Court quashed a conviction where there had been no information or summons under the statute creating the offence charged, and laid stress on the fact that the irregularity was not waived. Cleasby, B., at p. 335,

(1) 48 J. P. 343. (2) 4 Q. B. D. 614.
(3) 1 Ex. D. 320.

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said: "In administering justice summarily, strict regularity must be observed." In *Reg.* v. *Fletcher* (1) the materiality of a protest is recognised.

*Kemp*, for the respondent. The object of s. 10 seems to be merely that the alleged offender may be informed of the charge within twenty-eight days, so that he can have the perishable article examined in order to meet the charge. The section does not require the hearing to be within any prescribed time.

LORD COLERIDGE, C.J. This case has been well argued, and is important. It is said that it has become a general practice for the magistrate's clerk to hear complaints without any written or other information, fill up a form of summons, obtain the signature of any magistrate, and so cause a man to be summoned, and perhaps exposed to a heavy penalty, although the magistrate signing the summons may not have ascertained whether there was a primâ facie case against the person summoned. If it be, indeed, the practice to sign a summons without hearing an information, and for one person to hear the information and another to sign the summons, a practice more loose or likely to lead to injustice, especially in matters relating to perishable articles which require to be dealt with quickly, I can hardly conceive. In the present case, if the magistrate who signed the summons had heard the information, he might have thought that no primâ facie case had been made out, and have declined to issue the summons. The practice seems to me to be in direct contravention of the provisions of Jervis's Act, s. 1, which says that "in all cases" where a complaint shall be made to any justice, it shall be lawful for "such justice" to issue his summons. Clearly the Act did not mean that one justice was to hear the complaint and another to sign the summons. If I were at liberty to lay down the law for the first time, I should say that the provisions of Jervis's Act are to be obeyed, and, if disobeyed, the persons professing to act under them act without jurisdiction. But the law has been laid down otherwise, for I find that so long ago as the year 1865 Sir William Erle, in a case where a man had been brought before the magistrates under Jervis's Act without information or summons,

(1) Law Rep. 1 C. C. R. 320.

said: "In my opinion, if a party is before a magistrate, and he is then charged with the commission of an offence within the jurisdiction of that magistrate"—that is, which the magistrate has a right to entertain—"the latter has jurisdiction to proceed with that charge without any information or summons having been previously issued"—notwithstanding the enactment in Jervis's Act that it shall be issued—"unless the statute creating the offence imposes the necessity of taking some such step." That, as I understand it, means that Parliament might make the procedure imperative by enacting that "no proceedings shall be taken unless the provisions of Jervis's Act are followed," but that it had not done so. *Reg.* v. *Shaw* (1) does not stand alone. There is also *Reg.* v. *Hughes* (2), decided, after having been twice argued in the Court of Criminal Appeal, by a full Court, over which I presided, and Kelly, C.B., was the only dissentient judge. In that case the defendant was indicted for perjury, alleged to have been committed before justices at the hearing of a charge against a person brought up on a warrant illegally issued without a written information on oath, and the contention was that the proceedings were invalid; but the Court held that they were valid. The case establishes the proposition, that when a person is before justices who have jurisdiction to try the case they need not inquire how he came there, but may try it. That decision is binding on me, and I have no wish to depart from it. But the present case, I am glad to think, is not within it, and is distinguishable upon the sound ground taken by the counsel for the appellant. The document called a summons in this case was, in my opinion, no summons at all. But the accused was before the magistrate. Two distinctions, however, separate this case from those cited. First, in all the cases to which our attention has been called there was no protest made by the person who appeared, and the Courts said, applying a well-known rule of law expounded centuries ago, that faults of procedure may generally be waived by the person affected by them. They are mere irregularities, and if one who may insist on them waives them, submits to the judge, and takes his trial, it is afterwards too late for him to question the jurisdiction which

(1) 34 L. J. (M.C.) 169. (2) 4 Q. B. D. 614.

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Lord Coleridge, C.J.

he might have questioned at the time. In this case there was a protest, because when the case was called on before the magistrate the appellant took the same objection that he has taken to-day. He objected that there was no summons and no information, that the whole proceeding was irregular, and that the Court had no jurisdiction to try him because he was not properly brought there. Of course, it is assumed that if he had made no protest the cases cited would have been applicable; but his protest makes a marked distinction. I do not, however, feel able to decide in his favour on that point alone, for, although the fact of his protest ought to be a complete answer to the assumed jurisdiction, I cannot disguise from myself the fact that from the language of many of the judges in *Reg.* v. *Hughes* (1)—although, perhaps, not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in *Reg.* v. *Shaw* (2), they seem to assume that if the two conditions precedent of the presence of the accused and jurisdiction over the offence were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in *Reg.* v. *Hughes* (1), although something like that is said in one of the cases. It is an important question well worth consideration in the Court of Appeal. There is, however, a part of the able argument for the respondent which has not satisfied me, that is, as to s. 10 of the later Act (42 & 43 Vict. c. 30), which enacts that, "In all prosecutions under the principal Act, and notwithstanding the provisions of s. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention to the terms of the principal Act the seller is rendered liable to prosecution, and particulars of the offence or offences against the Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the

(1) 4 Q. B. D. 614. (2) 34 L. J. (M.C.) 169.

person summoned. The section appears to me to enact as a condition precedent to the trial of offences under the Acts that all charges shall be made within a reasonable time—in the case of perishable articles not exceeding twenty-eight days from the sale; and that the summons shall be served within twenty-eight days, and that the hearing shall be not less than seven days from the day of service, thus carefully securing to the person accused the opportunity of defending himself, and that he shall have at least seven days to prepare himself for his defence. I think that the provision as to *time* in that enactment cannot be disregarded; it is of the essence of the jurisdiction to try the offence. Except by extending *Reg.* v. *Hughes* (1) to this section, it is impossible to deny that it has been violated. It is possible to say that it can be treated like the other section as mere procedure, and that as the defendant was present the magistrate had jurisdiction to try the charge. But it seems to me that in this case the legislature has made it a condition precedent to the magistrate's jurisdiction that the proceedings should be brought within the operation of s. 10, and that in all prosecutions under the Act certain things shall be done and certain things shall not be done. The section is not only directory, but strongly imperative. In the present case there was, in my opinion, no summons. I think that, according to s. 10, which applies to this case, it was essential to the jurisdiction that it should be exercised in twenty-eight days, and that it was not so exercised, and the appellant is entitled to our judgment.

MATHEW, J. I am of the same opinion. I entirely agree that there was, in this case, no summons. A summons is a citation proceeding upon an information or complaint laid before the magistrate who issues the summons, and conveying to the person cited the fact that the magistrate is satisfied that there is a primâ facie case against him. The document in question purported to be a summons by the magistrate who heard the information and complaint. That was not so. The document might as well have been signed by a magistrate of another borough. It was worthless as a citation, and when the defendant appeared the

(1) 4 Q. B. D. 614.

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objection was taken, and the stipendiary magistrate acquiesced in that view; but he said, in effect, on the authority of the cases cited to him: "The defendant is now before me. There is an information and complaint now against him, and I will proceed to hear it. If he is prepared to meet the charge, it will be idle to impose on the prosecutor the necessity of issuing another summons." The defendant was entitled to say in answer: "You cannot hear an information given to you now, for a limit to your authority is prescribed by 42 & 43 Vict. c. 30, s. 10, and if a fresh summons is granted there will be an answer to it, that s. 10 prohibits the issuing of it after the expiration of twenty-eight days from the sale of the article in question."

*Judgment for appellant.*

Solicitors for appellant: *Bell, Brodrick, & Gray.*
Solicitors for respondent: *Cunliffes & Davenport.*

J. R.

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*June* 30.

[IN THE COURT OF APPEAL.]

FILBURN *v.* THE PEOPLE'S PALACE AND AQUARIUM COMPANY, LIMITED.

*Mischievous Animal—Animal feræ naturæ—Liability of Owner—Scienter.*

In an action to recover damages for personal injuries sustained by the plaintiff from an elephant which was exhibited by the defendants, the jury found that the defendants did not know the elephant to be dangerous:—

*Held*, that the defendants were liable, as the animal did not belong to a class which, according to the experience of mankind, is not dangerous to man, and therefore the owner kept such an animal at his own risk, and his liability for damage done by it was not affected by his ignorance of its dangerous character.

APPEAL from a judgment of Day, J.

The action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant, which was the property of the defendants, and was being exhibited by them. The learned judge left three questions to the jury: whether the elephant was an animal dangerous to man; whether the defendant knew the elephant to be dangerous; and whether

the plaintiff brought the attack on himself. The jury answered all three questions in the negative. The learned judge entered judgment for the plaintiff for a sum agreed upon in case the plaintiff should be entitled to recover.

The defendants appealed.

*Lockwood, Q.C.*, and *Cyril Dodd, Q.C.*, in support of the appeal. There are certain animals recognised as being of an untameable nature, and these a person keeps at his peril. In Hale's Pleas of the Crown (vol. i. p. 430), it is said: "Tho' he have no particular notice, that he did any such thing before, yet if it be a beast, that is feræ naturæ, as a lion, a bear, a wolf, yea an ape or a monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage." There is, however, no hard and fast line which prevents an animal feræ naturæ ceasing to belong to that class and becoming domesticated. The distinction is drawn in *Rex* v. *Huggins* (1), where it is said: "There is a difference between beasts that are feræ naturæ, as lions and tygers, which a man must always keep up at his peril; and beasts that are mansuetæ naturæ, and break through the tameness of their nature, such as oxen and horses In the latter case an action lies, if the owner has had notice of the quality of the beast; in the former case an action lies without such notice." All animals are wild by nature, and the reason for the distinction is, that some of them are treated as domesticated, because they have been tamed and are used in the service of man. Though there are wild elephants, just as there are wild oxen and horses, a great number have been tamed, and are used in the service of man: and the same ruling should apply to individuals of this class as to domesticated animals generally. The jury have negatived any knowledge on the part of the defendants of any dangerous character in this elephant, and they are, under these circumstances, entitled to the verdict.

*Montague Lush*, contra, was not called on.

LORD ESHER, M.R. The only difficulty I feel in the decision of this case is whether it is possible to enunciate any formula

(1) 2 Ld. Raym. 1574.

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under which this and similar cases may be classified. The law of England recognises two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and anyone who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognise as not being dangerous on account of their nature. Whether they are feræ naturæ so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognised in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others that I will not attempt to enumerate. I take it this recognition has come about from the fact that years ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions—that is, unless it is shewn to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation—it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shewn by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was, therefore, immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The last case of this kind discussed was *May* v. *Burdett* (1), but there the monkey which did the mischief was said to be accustomed to attack mankind, to the knowledge of the person who kept it. That does not decide this case. We have had no case cited to us, nor any evidence, to shew that elephants in this country are not as a class dangerous; nor are they commonly known here to belong to the class of domesticated animals. Therefore a person who keeps one is liable, though he does not know that the particular one that he keeps is mischievous. Applying that principle to this case, it appears that the judgment for the plaintiff was right, and this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. The broad principle that governs this case is that laid down in *Fletcher* v. *Rylands* (2), that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. The question of liability for damage done by mischievous animals is a branch of that law which has been applied in the same way from the times of Lord Holt (3) and of Hale until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal, unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants as a class have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a degree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no

(1) 9 Q. B 101. (2) Law Rep. 1 Ex. 265; Law Rep. 3 H. L. 330.
(3) See *Mason* v. *Keeling*, 12 Mod. 332.

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knowledge of its mischievous propensities. I agree, therefore, that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for plaintiff *Hamlin, Grammer, & Hamlin, for Dunn & French, Leeds.*

Solicitors for defendants: *Speechly & Co., for Mumford & Co., Bradford.*

A. M.

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*y* 10.

[IN THE COURT OF APPEAL.]

COHEN *v.* MITCHELL.

*Bankruptcy—Undischarged Bankrupt—After-acquired Property—Right of Action—Assignment of Chose in Action—Property vesting in Trustee—Rights of Trustee—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *ss.* 44, 54.

Where a bankrupt, who has not obtained his discharge, enters into transactions in respect of property acquired after the bankruptcy, then, until the trustee intervenes, all such transactions, with any person dealing with the bankrupt bonâ fide and for value, and whether with or without knowledge of the bankruptcy, are valid against the trustee.

APPEAL from the judgment of Mathew, J.

This was an interpleader issue arising under the following circumstances. One Arthur Cohen became bankrupt, and afterwards, and before he obtained his discharge, he carried on business in buying and selling agricultural machines, and to enable him to do so Hyam Cohen advanced several sums of money. One Foale seized some of the machines, and the bankrupt brought an action against him for a wrongful conversion of the machines so seized. The bankrupt, finding that he had no money with which to carry on the action, assigned the cause of action to Hyam Cohen in consideration of the money then due to him, and the further sums necessary to carry on the action. The action resulted in a verdict for 120*l.* The trustee in bankruptcy of Arthur Cohen, before the money was paid over, intervened and demanded it of Foale, as part of the property of the bankrupt which vested in his trustee under s. 44 of the Bankruptcy Act, 1883. Hyam Cohen also claimed the amount under his assignment, and Foale interpleaded, and paid the money into Court;

and this issue was tried, in which Hyam Cohen was plaintiff and the trustee defendant.

The learned judge gave judgment for the plaintiff.

The defendant appealed.

*Mattinson*, for the defendant. By sub-s. 1 of s. 54 of the Bankruptcy Act, 1883, immediately on a debtor being adjudged bankrupt the property of the bankrupt is to vest in the official receiver as trustee, and by sub-s. 2, "on the appointment of a trustee the property shall forthwith pass to and vest in the trustee appointed." By s. 44, "the property of the bankrupt" shall comprise (inter alia) "all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy, or may be acquired by or devolve on him before his discharge." "Property" is defined by s. 168 as including "money, goods, and things in action." Consequently, as the bankrupt has not obtained his discharge, the machines which Foale wrongly converted, and the cause of action against him, and the damages recovered against him, vested in the trustee as being "property of the bankrupt." It is admitted that the bankrupt assigned the cause of action against Foale to Hyam Cohen for value; but Hyam proved as a creditor in the bankruptcy, and he knew that the bankrupt was undischarged. The ground of the decision of Mathew, J., was, that before the trustee intervened to assert his title Hyam Cohen had acquired a title for value to the cause of action. All rights of action of an undischarged bankrupt, except those for a merely personal tort or in respect of the price of personal services, pass to his trustee: *Wadling* v. *Oliphant* (1); *Meggy* v. *Imperial Discount Co.* (2); *Emden* v. *Carte.* (3)

There is no evidence that the trustee knew of the conversion of the machines before the action was brought. Mathew, J., relied upon *Jameson* v. *Brick and Stone Co.* (4), and *Ex parte Dewhurst.* (5) *Herbert* v. *Sayer* (6), was cited to the contrary. In *Ex parte Dewhurst* (5), it was held that the trustee of an undischarged bankrupt could not recover money which the bankrupt

(1) 1 Q. B. D. 145.
(2) 3 Q. B. D. 711.
(3) 17 Ch. D. 169, 768.
(4) 4 Q. B. D. 208.
(5) Law Rep. 7 Ch. 185.
(6) 5 Q. B. 965.

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had paid away for value. In the present case the money is in Court; the trustee intercepted it before it had been paid to the bankrupt. The trustee has done the very thing which in *Ex parte Dewhurst* (1), James, L.J., said might have been done by the trustee. The passage quoted by Willes, J., in *Kitson* v. *Hardwick* (2), which was cited by Fry, J., in *Emden* v. *Carte* (3), is in favour of the defendant's claim. Primâ facie all property which accrues to an undischarged bankrupt passes to his trustee; the onus is on the person who disputes the trustee's title: *In re Dowling.* (4) In *Hodgson* v. *Sidney* (5), it was held that the right to recover damages for a tort had passed to a bankrupt's assignee. The trustee could have sued Foale for the conversion of the machines if he had discovered it before the bankrupt brought his action.

*Muir Mackenzie*, for the plaintiff. The cause of action was assigned for value by the bankrupt to Hyam Cohen before the trustee intervened. It is just as if the machines had been sold by the bankrupt before the intervention of the trustee; in such a case the trustee could not have claimed the machines. The general principle that a verdict recovered by an undischarged bankrupt would go to the trustee is not disputed; but this is a case of a sale and purchase, and the trustee, if he has not interfered in any way before the transaction is complete, cannot follow either money or goods which have got into the hands of third parties. The cause of action was valueless to the bankrupt, as he had no money to enforce it; so that the position of Hyam Cohen was analogous to that of a person who advances money to an uncertificated bankrupt to enable him to trade, who is always protected. An uncertificated bankrupt may do what any other person may do subject to the right of the trustee to intervene. Until that takes place all the transactions of the bankrupt are valid. Reading *Herbert* v. *Sayer* (6), "all future property and contracts vest in the assignees . . . but there must be some property in the bankrupt, or contracts with him, before such property or contracts can vest in the assignees," with the decision in *Ex*

(1) Law Rep. 7 Ch. 185.
(2) Law Rep. 7 C. P. 473, at p 479.
(3) 17 Ch D. 169, at p. 172.
(4) 4 Ch. D. 689.
(5) Law Rep. 1 Ex. 313.
(6) 5 Q. B. 965, at p. 981.

*parte Dewhurst* (1), that money received by an undischarged bankrupt and paid away for value cannot be followed by the trustee, it would appear to be immaterial whether what the bankrupt has parted with is money or property. The critical time is that at which the trustee intervenes, and until then all transactions for value entered into by persons who deal with the bankrupt in good faith are valid against the trustee whether he has or has not knowledge of such transactions. If the headnote in *Meux* v. *Smith* (2) can be supported by the report, which is rather vague, it would establish the propositions contended for.

*Mattinson*, in reply. The distinction between this case and *Ex parte Dewhurst* (3) is, that the subject-matter in the latter was money and not property, and that it was in the possession of the third party. It is difficult to see how a person who takes over property from a bankrupt, which he knows to belong to the trustee, can get any title to it.

He also cited *Ex parte Ford* (4) and *Engelback* v. *Nixon*. (5)

LORD ESHER, M.R. In this case there has been an interpleader order and issue, and the question raised by the issue is whether the trustee of an uncertificated bankrupt or the plaintiff, Hyam Cohen, is entitled to the proceeds of an action brought by the bankrupt against one Foale, for the wrongful conversion by him of certain agricultural machines. The bankrupt had not obtained his discharge; but he carried on a business in buying and selling agricultural machines, though uncertificated, not with the leave of the trustee, and, I believe it is asserted, without his knowledge. The plaintiff, knowing the circumstances, advanced money to the bankrupt to enable him to carry on the business. Some of the machinery which had been acquired in the business after the bankruptcy was taken possession of, wrongfully as against the bankrupt, and he brought an action in his own name against the wrongdoer and recovered judgment for a sum of money as damages. Up to that time the trustee had not interfered; but after judgment, and before the money was paid over, he claimed it for the benefit of the estate. On this the

(1) Law Rep. 7 Ch. 185, at p. 186
(2) 11 Sim. 410.
(3) Law Rep 7 Ch. 185.
(4) 1 Ch. D. 521.
(5) Law Rep. 10 C. P. 645.

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question arises as to the right of the trustee against whom the plaintiff claims the money under these circumstances. After the action commenced, the bankrupt either mortgaged or assigned the right of action to the plaintiff for money already advanced and a further sum to be added to carry on the action. No doubt the plaintiff knew that the bankrupt had not obtained his discharge; but it is not alleged that he acted otherwise than honestly. The question then is whether the trustee intervened too late to acquire the right he claims. I think it is admitted, that if what was assigned had been money the proceeds of the action, and the trustee had interfered before that money was paid over, he would have been entitled to demand that it should be paid to him, and equally, that if he had not interfered till after the payment over of the money, he would have been too late, and that the person who received the money could not be called upon to pay it back. But now the question arises whether this rule as to the time when the trustee can effectively intervene applies in this case. It is said, on the one side, that it applies to every effective transaction, either at law or in equity, and on the other, that it applies only where the thing dealt with is money. The question therefore arises whether there is any difference in principle between the two cases, and whether any Court has ever decided that there is a distinction. I cannot see on principle that any distinction exists. Of course all the property which belongs to the bankrupt at the time of the bankruptcy becomes at once the property of the trustee. But does all the property acquired by the bankrupt after his bankruptcy belong to the trustee absolutely, so that the bankrupt is divested of all interest and property in it, or does it remain the property of the bankrupt, so that at any rate he can deal with it until the trustee interferes? In the case of property coming under the bankruptcy, if the bankrupt were to endeavour to maintain an action, in which the defendant was not estopped from denying the bankrupt's property in the subject-matter of the action, it would be a good plea that the property is not his, but is vested in the trustee; but with regard to after-acquired property, it has been held that such a plea would be bad unless it went on to shew that the trustee had intervened before the transaction in respect of which the action is brought. That seems to be conclusive to

shew that the bankrupt has a property, whether absolute or not is immaterial, in such things till the trustee interferes.

On principle I cannot see why this should be confined to money. There is no reason for so confining it; but all the reasons which apply to a transaction as to money apply with equal force to any other transaction, and the fact that money is currency was never relied on before to-day as creating a distinction. I am, therefore, prepared to lay down a proposition which has been agreed upon by us all, and which has been written down by my brother Lopes. It is this—until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him bonâ fide and for value, in respect of his after-acquired property, whether with or without knowledge of the bankruptcy, are valid against the trustee. It will be seen, I think, from the wording of that proposition, that the stress of bona fides is laid entirely and solely on the person dealing with the bankrupt; and if he has dealt in good faith, the question of whether the bankrupt, as between himself and the creditors, is also dealing in good faith is immaterial.

Is there then any case conflicting with this view? *Meggy* v. *Imperial Discount Co.* (1) seems to me not to touch this point. The cases that deal with it are *Herbert* v. *Sayer* (2) and *Ex parte Dewhurst* (3); but so far from being contrary to the proposition I have enunciated, they seem to me to support it. It is true the latter case dealt with money only; but taking the two cases together, they support the whole proposition and shew that it should not be confined to money. The case of *Wadling* v. *Oliphant* (4) does not interfere with the proposition we have laid down. There is no case, so far as I can see, standing in the way, though I admit that, in terms, we are laying down a proposition wider than appears to have been laid down before. I say "in terms" because what has been laid down before involves a principle which supports the proposition to its full extent.

The transaction between the bankrupt and the claimant was one which gave a right to the latter which he could have supported against the bankrupt; and the action having been to

(1) 3 Q. B. D. 711.
(2) 5 Q. B. 965.
(3) Law Rep. 7 Ch. 185.
(4) 1 Q. B. D. 145.

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enforce a right which accrued to the bankrupt after the bankruptcy, the circumstances bring the case within the proposition which I have laid down, and the decision appealed against was right. The appeal, therefore, fails, and must be dismissed.

FRY, L.J. The clause in the Bankruptcy Act which vests the property in the trustee for distribution amongst the creditors includes all such property as shall belong to or may be vested in the bankrupt at the commencement of the bankruptcy, and also which may be acquired by or devolve upon him before his discharge. If one merely confined one's attention to the words of the section, the reader might suppose that both those kinds of property vested absolutely in the trustee—vested in him in precisely the same manner. But the inconvenience of such a conclusion has been apparent not only from the present statute, but from many statutes which have preceded it, which contain substantially the same language. It is obvious that there is no difficulty in divesting out of the bankrupt and vesting in the trustee the whole of the property which was in the bankrupt at the commencement of the bankruptcy; but, unless (to use the language of Lord Mansfield) the bankrupt is to be made the slave of the trustee, it is obvious that he may have dealings with his fellow-men, and, in the exercise of his industry, he may acquire rights and he may acquire property, and therefore there is the greatest difficulty in supposing that every right acquired and every piece of property devolving upon the bankrupt after his bankruptcy and before his discharge vests in the trustee, in the same manner in which the property at the commencement of the bankruptcy has vested in the trustee. Now, that difficulty has been met by establishing a distinction, and it has been held that the property does not vest in the trustee, so as to prevent the bankrupt from maintaining an action, simply by reason of his bankruptcy, and that the person who sets up the bankruptcy as his defence to any action brought by the bankrupt in respect of after-acquired property must not only allege the bankruptcy, but must allege that the trustee has intervened; and if he does not so allege, the defence is not good. The bankrupt, therefore, clearly takes some kind of interest in the after-acquired property.

Now, that distinction was very plainly expressed in the judgment of the Court of Exchequer Chamber in the case of *Herbert* v. *Sayer*. (1) The passage is so important that I shall read it. Having referred to the words of the then existing statutes, the Lord Chief Justice of the Common Pleas said: "The effect of the statutory enactments may be, either to transfer immediately such property or contracts from the bankrupt to the assignees, vesting the property in the bankrupt for an instant only, or to give the assignees the beneficial interest, and to make the bankrupt acquire property or contract for their benefit only, in the nature of an agent. The cases accord with the latter construction of the statute; and it is most consistent with convenience; for otherwise there would be no protection to persons dealing with an uncertificated bankrupt. Not only would they acquire no title by purchases from him, but payments for such purchases, and for all other debts due to the uncertificated bankrupt, would be invalidated. The legislature, by several statutes, have protected all payments by and to, and all dealings and transactions with, the bankrupt bonâ fide made or entered into without notice of the act of bankruptcy before the fiat; but there is no provision by the statute law for such payments, dealings, or transactions after the fiat; and the only way by which they can be rendered valid, and great confusion, inconvenience, and hardship prevented, is by adopting the latter construction, and holding that the bankrupt acquires property, and contracts, for the assignees, who may, whenever they please, disaffirm his act; but, until they do so, his acts are all valid." Now I adopt that view, with the single exception that I think the language, "disaffirm his act," should be interpreted to mean "intervene," because I do not think that the trustee who does intervene has any power retrospectively to disaffirm what has otherwise been validly done by the bankrupt; but from the moment of his intervention the property vests in him absolutely, and can no longer be recovered by or dealt with by the bankrupt. Now, that being the nature of the distinction between the two modes of vesting which has been long ago established, and which has not been, in my opinion, altered in any way by recent legislation in bankruptcy,

(1) 5 Q. B. 965.

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Fry, L.J.

it follows that the rights of the bankrupt in respect of after-acquired property must be very different from what they are in respect of other property; and it appears to me to follow from that distinction, that not only payments of money made to a person who receives the money in good faith, but dispositions of personal or other property made by the bankrupt to a person who receives them in good faith and for value, must be valid; and therefore I think the rule expressed in the terms read by the Master of the Rolls is the correct one for us to lay down. I am quite aware that the rule has not been formulated in those terms yet; but it appears to me to be the true result of the earlier authorities, and in fact follows from the distinction between the two modes of vesting, and therefore I do not see how we can stop short from drawing that conclusion. I think, therefore, in this case there was in point of fact a dealing with the cause of action, which was entered into in good faith upon the part of the person who was receiving the assignment, as well as, in this case, on the part of the bankrupt who assigned; and that being so, the intervention of the trustee had not invalidated the assignment, which was good at the time it was made. Now if the trustee had desired to intervene when the bankrupt was carrying on his business, he might probably have acquired a right to these very machines. He might have taken the machines themselves if they were in the possession of the bankrupt, and have taken them out of his possession and taken them into his own; or he might even at a later date, when the action had begun, and before the assignment, have intervened and insisted upon having the conduct of the action and making the action his own, after which no assignment could validly have been made of the cause of that action. Again, if no assignment had been made but a verdict had been recovered, he might before the payment of the money have intervened. But he did none of these things. I think, therefore, that effect must be given to the transaction of the bankrupt with a person who acted bonâ fide and with no fraudulent intention.

LOPES, L.J. I have nothing to add. I think the rule which has been read by the Master of the Rolls is based on principle,

which is properly deducible from the cases of *Herbert* v. *Sayer* (1) and *Ex parte Dewhurst.* (2) It may be that it is a development of the principle laid down in those cases; but if it is, I think it is a proper development of the principle of those cases.

I think this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for plaintiff: *Prince, Ayres & Austin, for Prince & Ayres, Brighton.*

Solicitors for defendant: *Nicholson, Graham & Graham.*

A. M.

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[IN THE COURT OF APPEAL.]

*June* 6

IN RE ASHWIN. EX PARTE ASHWIN.

*Bankruptcy—Appeal to Court of Appeal—"Criminal Cause or Matter"—Committal of Bankrupt for Contempt of Court—Wilful Failure to deliver up Property to Trustee—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 24 (4), *s.* 104 (2)—*Judicature Act,* 1873 (36 & 37 *Vict. c.* 66), *s.* 47.

Sub-s. 2 of s. 104 of the Bankruptcy Act, 1883, provides that "orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows," and proceeds to specify the Courts to which different appeals are to be brought.

*Held,* that, by virtue of this sub-section, a bankrupt is entitled to appeal against an order under sub-s. 4 of s. 24 of the Bankruptcy Act, 1883, committing him for contempt of Court, for wilful failure to deliver up to the trustee in his bankruptcy property forming part of his estate.

APPEAL by the bankrupt against an order of Cave, J., under s. 24 (4) of the Bankruptcy Act, 1883, committing him for contempt of Court, on the ground that he had wilfully failed to deliver up to the trustee in the bankruptcy the title-deeds of certain property which formed part of the bankrupt's estate.

*Harper,* for the bankrupt.

[LORD ESHER, M.R. Is there any right of appeal? Was not this order made in a "criminal matter," so that s. 47 of the Judicature Act, 1873, prevents an appeal?—*O'Shea* v. *O'Shea.* (3)]

Sect. 104, sub-s. 2, of the Bankruptcy Act, 1883, provides that "orders in bankruptcy matters shall, at the instance of any per-

(1) 5 Q. B 965. (2) Law Rep. 7 Ch. 185.
(3) 15 P. D. 59.

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son aggrieved, be subject to appeal as follows," and specifies the Courts to which different appeals are to be brought. That gives a right to appeal against any order in a bankruptcy matter.

*J. G. Witt*, and *Bartley Denniss*, for the trustee, did not insist on the objection.

THE COURT (Lord Esher, M.R., and Lindley and Lopes, L.JJ.) held that s. 104, sub-s. 2, gave the bankrupt a right to appeal.

The appeal was then heard on the merits and was dismissed.

Solicitors: *Morris & Rickards; Newman, Hays & Co.*

W. L. C.

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*June* 20. THE GUARDIANS OF THE WEST HAM UNION, APPELLANTS; THE OVERSEERS OF ST. GILES-IN-THE FIELDS, RESPONDENTS.

*Poor Law—Settlement—Child over Sixteen—Derivative Settlement—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

In determining the settlement of a married woman, it appeared that her husband had never acquired a settlement for himself; but the birth settlements of the husband and of the husband's father were shewn:—

*Held*, following the interpretation put on s. 35 of the Divided Parishes Act, 1876, in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (14 App. Cas. 465), that the pauper's husband took his father's settlement, it not being derivative, and that therefore the pauper took the same settlement, and not the birth settlement of her husband.

UPON appeal against an order for the removal of Elizabeth Crawley from the parishes of St. Giles-in-the-Fields, and St. George, Bloomsbury, to the West Ham Union, as the place of her last legal settlement, the quarter sessions for the county of London affirmed the order subject to the following case:—

Elizabeth Crawley, the pauper, was the lawful wife of Albert Crawley, who was absent from her.

Albert Crawley was born in the parish of Walthamstow, in the West Ham Union, on April 5, 1857, and had not himself acquired any settlement.

Albert Crawley was the lawful son of James and Elizabeth Crawley.

James Crawley was born in the parish of Tottenham, in the Edmonton Union, on April 19, 1825, and never acquired any

settlement before his son Albert Crawley attained the age of twenty-one years.

The quarter sessions held that the settlement of the pauper was her husband's birth settlement in the parish of Walthamstow.

The appellants contended that the pauper was settled in the parish of Tottenham, in the Edmonton Union, in right of the settlement which, as they alleged, her husband Albert Crawley derived from his father James Crawley.

The respondents contended that the pauper took her husband Albert Crawley's birth settlement in the parish of Walthamstow, in the West Ham Union.

The question for the opinion of the Court was whether upon the above facts the pauper was settled in the parish of Walthamstow, in the West Ham Union, or in the parish of Tottenham, in the Edmonton Union.

*Philbrick, Q.C.*, and *Forrest Fulton*, for the appellants. The case is concluded by the decision of the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon Union.* (1) The judgment of Lord Watson, which is not dissented from by any of the learned Lords, says expressly that the third clause of s. 35 (2) of the Divided Parishes Act, 1876, applies to legitimate children above sixteen, and that, subject to certain provisions and limitations (which do not affect the present case) the effect of the section is to reserve to children the same rights in relation to parentage settlement which they possessed under the then existing law.

(1) 14 App. Cas. 465.

(2) By s. 35 of the Divided Parishes Act, 1876 (39 & 40 Vict. c. 61): "No person shall be deemed to have derived a settlement from any other person, whether by parentage, estate, or otherwise, except in the case of a wife from her husband and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

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In the present case, therefore, Albert Crawley would take the settlement of his father James, unless that settlement happened to be a derivative settlement, in which case the Court would be precluded by the third clause of the section from inquiring into it; as a fact, James Crawley's only settlement is his own birth settlement, and his son Albert, the pauper's husband, therefore takes that settlement, and the pauper takes it from her husband.

[They also cited *Guardians of West Derby Union* v. *Guardians of Atcham Union.* (1)]

*Poland, Q.C.*, and *Buckmaster*, for the respondents. The present case is covered by that of *Reg.* v. *Bridgnorth* (2), unless that case has been overruled by the House of Lords in *Guardians of Reigate Union* v. *Guardians of Croydon Union.* (3) The true effect, however, of [the latter case upon *Reg.* v. *Bridgnorth* (2), is that that case is only overruled so far as it lays down that the test to be applied in removal cases is the status of the pauper at the moment of adjudication. By the first clause of s. 35 of the Divided Parishes Act, 1876, the age of emancipation is fixed at sixteen—a child under that age is to have its parentage settlement, whether that settlement be derivative or not; and the last clause of the section deals with a child over sixteen, the effect of it being, that if the parentage settlement of such a child be itself derivative the child is to take its own birth settlement. In the present case nothing but the birth settlement of James Crawley is known, and his true settlement cannot be determined without an inquiry into his derivative settlement. This is contrary to the express language of the section, and Albert Crawley cannot therefore take the settlement of James, but must take his own birth settlement.

[WILLS, J. The settlement of James is not a derivative settlement, but a birth settlement; and surely an inquiry into his derivative settlement would only be wanted if he had never gained a settlement and his birth settlement could not be ascertained.]

*Philbrick, Q.C.*, in reply, cited *Guardians of Dorchester Union* v. *Guardians of Poplar Union.* (4)

(1) 24 Q B D. 117
(2) 11 Q. B. D. 314.
(3) 14 App. Cas. 465.
(4) 21 Q. B. D. 88.

LORD COLERIDGE, C.J. I have felt considerable difficulty in coming to a decision on this case in consequence of the recent decision of the House of Lords upon s. 35 of the Divided Parishes Act; had it not been for that decision, I should have thought that the case would have been perfectly clear. The decision in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1) is, however, binding upon us, and our judgment in this case must be in accordance with the law there laid down. There are two things which do not seem open to dispute: first, that although in the last clause of s. 35 the expression used is, "any child in this section mentioned," and the only children previously mentioned in the section are children who are under sixteen or are illegitimate, yet children who are over sixteen and are legitimate are by that decision brought within the section, although not mentioned in it. Secondly, it is clear that a child who is legitimate and is over sixteen is not a person within the meaning of the Act; for the section begins by saying, "no person shall be deemed to have derived a settlement from any other person," and then goes on to make apparently two exceptions only—a wife and a child under sixteen. These, however, cannot be the only exceptions, as the House of Lords says that where a child is over sixteen and legitimate it is to take its parentage settlement, unless that settlement is itself derivative. Accepting, however, as we are bound to do, the decision of the House of Lords as being a correct exposition of the law, there can be no doubt that the contention of the appellants is correct. This is the case of a pauper taking the settlement of her husband, who had no settlement but that of his birth, unless he had a settlement which he had derived from his father. In such a case the Act of Parliament seems to say that he shall not derive a settlement from his father, but the House of Lords says that he shall do so unless the father's settlement is itself derivative, and that in such a case his parentage settlement is expressly preserved. As, therefore, a man may have a settlement by parentage where such settlement is not derivative, it follows that a pauper over sixteen and legitimate who has not acquired a settlement for himself takes the settlement of his father if that is non-

(1) 14 App. Cas. 465.

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GUARDIANS OF WEST HAM UNION v. OVERSEERS OF ST GILES-IN-THE-FIELDS.

derivative; and applying that principle to the facts of the present case, Albert Crawley's settlement was that of his father James Crawley, and the pauper is legally settled in the parish of Tottenham.

WILLS, J. I am of the same opinion, though had it not been for the judgment of the House of Lords I should have thought the decision of quarter sessions right; the House of Lords has, however, felt constrained to put a different construction upon the Act of Parliament to that which would, at first sight, appear to to be its meaning, and it only remains for us to accept that decision and to apply it to the case before us. In the course of his exhaustive judgment in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (1), Lord Watson gives a short summary of the effect of s. 35, and (omitting the first four heads, which have no application to the present case), he says, that the effect is, subject to certain provisions and limitations not now material, to reserve to children the same rights in relation to parentage settlement which they possessed under the then existing law. Now, it is contended for the respondents, that the facts stated in this case raise a doubt whether there were not further facts behind which would shew James Crawley's settlement to have been derivative; but I cannot assent to that proposition. All that appears in the case is that Albert Crawley had his birth settlement, and that his father had his own birth settlement. Nothing else is known about the family. It is clear, therefore, that if children have now the same rights in regard to parentage settlements as they had before the Act, the settlement of Albert Crawley is that of his father. I have, therefore, come to the conclusion that, applying to the facts stated in the present case the explanation of the statute given by the House of Lords, the settlement of the pauper is the birth settlement of her husband's father, James Crawley.

*Appeal allowed.*

Solicitor for appellants: *F. E. Hilleary.*

Solicitor for respondents: *A. C. Cronin.*

(1) 14 App. Cas. 465, at p. 484.

W. J. B.

HICKLEY, APPELLANT; GREENWOOD, RESPONDENT.

1890
June 12.

*Bill of Sale—Formalities—Description of Chattels—"Specifically described"—45 & 46 Vict. c. 43, s. 4.*

Chattels assigned by a bill of sale were described as "Roan horse, 'Drummer'; brown mare and foal; three rade carts":—

*Held*, that, in the absence of evidence of facts shewing that the description was not specific, it was sufficient.

*Witt* v. *Banner* (20 Q. B. D. 114) and *Carpenter* v. *Deen* (23 Q. B. D. 566) distinguished.

APPEAL by the plaintiff from the decision of the judge of the county court of Surrey, holden at Farnham.

The action was brought to recover possession of certain goods, which had been assigned under a bill of sale by a person named Edward Tuck, a beerhouse keeper and carman, to the plaintiff, who was a coal merchant, in consideration of a loan of 40*l.*, with interest at 5 per cent. per annum, and which Tuck had afterwards sold to the defendant.

It was objected on behalf of the defendant that the goods were not specifically described so as to satisfy the requirements of the Bills of Sale Act (1878) Amendment Act, 1882. (1)

The description in question was as follows:—"Roan horse, 'Drummer'; brown mare and foal; three rade (2) carts." It was stated in evidence that the grantor had only three carts in his possession. Evidence was tendered on behalf of the defendant with regard to the alleged misdescription; but the county court judge declined to receive it, and gave judgment for the defendant on the ground that the description was insufficient.

*De Colyar*, for the plaintiff, in support of the appeal. The county court judge held that he was bound by the decision of

(1) 45 & 46 Vict. c. 43, s. 4, by which "Every bill of sale shall have annexed thereto, or written thereon, a schedule containing an inventory of the personal chattels comprised in the bill of sale; and such bill of sale, save as hereinafter mentioned, shall have effect only in respect of the personal chattels specifically described in the said schedule, and shall be void except as against the grantor in respect of any personal chattels not so specifically described."

(2) "'*Rades*.' The rails of a waggon."—Halliwell's Dictionary of Archaic and Provincial Words, p. 662, 7th ed., 1872.

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the majority of the Court of Appeal in *Carpenter* v. *Deen* (1) to hold the description insufficient; but that case is distinguishable from the present, for the description here is much more specific.

*G. G Greenwood*, for the defendant, was called on. The description is ambiguous and misleading. The case is governed by the decision already referred to, and is also undistinguishable from *Witt* v. *Banner*. (2)

[He also cited *Roberts* v. *Roberts*. (3)]

CAVE, J. I am sorry to say that this case must go down for further consideration before the county court judge, for this appears to have been a perfectly honest transaction.

The only point of any importance is that raised by the objection that there is not a sufficient specific description of the goods assigned by the bill of sale. Where this objection is taken, in order to succeed the objector must either shew that from the nature of the description the goods cannot be identified, or he must bring evidence to shew that in the particular case then under consideration the goods described are incapable of identification. The respondent's counsel relied on *Witt* v. *Banner* (2); but in that case the description was altogether illusory, and it was no doubt intended that any pictures which might at any time happen to be on the grantor's premises should be liable to be seized. It is impossible to believe that the grantor in that case can have had in his possession exactly the round number of articles of each description that was mentioned in the schedule. *Carpenter* v. *Deen* (1) is, perhaps, a case of somewhat more difficulty, and there Lopes, L.J., differed from the opinion of the other two Lords Justices; but we are bound by the decision of the majority of the Court. In that case the grantor was a dairyman; and the majority of the Court appear to have come to the conclusion that it was intended to allow the grantee to seize any milch cows which at any time might be upon the grantor's premises. Here the case is totally different. The grantor was a beerhouse keeper and carman, and it cannot be said that the goods were described in such a way that they could not possibly be

(1) 23 Q. B. D. 566. (2) 19 Q. B. D. 276; affirmed 20 Q. B. D. 114.
(3) 13 Q. B. D. 794.

identified, for one horse was described by a name, while the other animals were described as "brown mare and foal." In the absence of evidence to the contrary, it is not hard to identify goods so described; and it lies upon the party taking the objection to bring evidence to shew that the description in such a case as the present is insufficient. The consequence of holding otherwise would be, that in every case in which the goods are described without an individual name it would be necessary to call witnesses to identify every article. I do not say how it might be if, for instance, it were shewn that at the time of the execution of the bill of sale the grantor had more than three rade carts in his possession; but in the absence of evidence to the contrary, I am of opinion that the description is sufficient.

A. L. SMITH, J., concurred.

*Appeal allowed.*

Solicitor for plaintiff: *Richard Eve, Aldershot.*

Solicitors for defendant: *Johnson, Weatherall, & Sturt, for Potter & Crundwell, Farnham.*

P. B. H.

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MUMFORD *v.* J. & C. COLLIER.

*June* 26.

*Mortgage—Contract—Attornment Clause—Bill of Sale—Landlord and Tenant—Bills of Sale Acts,* 1878 (41 *&* 42 *Vict. c.* 31), *s.* 6, *and* 1882 (45 *&* 46 *Vict. c.* 43), *s.* 9—*Orders III., r.* 6, *and XIV., r.* 1.

By s. 6 of the Bills of Sale Act, 1878, every attornment whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any debt or advance shall be deemed to be a bill of sale, within the meaning of the Act, of any personal chattels which may be seized or taken under such power of distress; and by s. 9 of the Bills of Sale Act, 1882, a bill o sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to that Act:—

*Held,* that these enactments did not render void the ordinary attornment clause found in mortgages of real property so as to destroy the relation of landlord and tenant created by it between the mortgagee and mortgagor.

APPEAL from chambers.

The writ of summons in the action was specially indorsed under Order III., r. 6, with a claim for the recovery of land.

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MUMFORD v. COLLIER.

By a mortgage deed, dated March 25, 1884, the defendants mortgaged certain land (being the land in question in the action), with the steam-engines, boilers, plant, machinery, fixtures, implements, and utensils thereon, to the plaintiff to secure a sum of 6000*l.* and interest.

The deed was in the ordinary form of a mortgage of land, and contained the following attornment clause: "And the mortgagors hereby attorn tenants to the mortgagee of the hereditaments and premises hereby conveyed and assigned at the yearly rent of 300*l.*, to be paid half-yearly, on the 29th day of September, and the 25th day of March, provided always that the mortgagee, his heirs, or assigns may at any time after the said 29th day of September next enter into and upon the said hereditaments and premises, or any part thereof, and determine the tenancy hereby created, without giving to the mortgagors any notice to quit."

Lawrance, J., at chambers, having refused to set aside the order of a master allowing the plaintiff to enter judgment, under Order XIV., r. 1, for the recovery of the land, the defendants appealed.

*Hansell*, for the defendants. The relation of landlord and tenant does not exist between the plaintiff and the defendants, so that Order III., r. 6, and Order XIV., r. 1, cannot be applied to this case. The attornment clause, which is relied on as creating that relation, is constituted a bill of sale by s. 6 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), as being an "attornment whereby a power of distress is given by way of security for an advance, and whereby rent is reserved or made payable as a mode of providing for the payment of interest on such advance." The clause is therefore rendered wholly void by s. 9 of the Bills of Sale Act, 1882 (45 & 46 Vict. c. 43), because it is not in accordance with the form in the schedule to that Act. Admitting that the attornment clause is severable from the rest of the mortgage deed, the clause itself cannot be severed. It cannot be void as a bill of sale of personal chattels, and good as constituting the relation of landlord and tenant. If it is a bill of sale at all, it is good or bad in toto: *Thomas* v. *Kelly* (1);

(1) 13 App. Cas. 506.

*Davis* v. *Rees.* (1) In *In re Willis, Ex parte Kennedy* (2), Lindley, L.J., in his judgment, pointed out (at pp. 394, 395), that an attornment clause such as the one in question obviously created the relation of landlord and tenant between the mortgagor and the mortgagee; that it was made a bill of sale by s. 6, notwithstanding that no power of distress was given in express terms to the mortgagee, and the Lord Justice said that the Act intended to strike at every attornment by way of security for money lent.

*C. C. Scott,* for the plaintiff. The Bills of Sale Acts and the decisions upon them have no application to conveyances of real property. That is shewn by s. 4 of the Act of 1878, defining the terms "bill of sale" and "personal chattels." Sect. 6 expressly limits the extent to which an attornment clause shall "be deemed to be" a bill of sale. It shall be deemed to be a bill of sale "of any personal chattels which may be seized or taken under such power of distress." For any purpose connected with the realty the attornment clause is not affected. Sect. 9 of the Act of 1882 does not repeal or enlarge the terms of s. 6 of the Act of 1878. The Act of 1882 is only to be read with the earlier Act so far as is consistent with the tenour thereof. In *Thomas* v. *Kelly* (3) and *Davis* v. *Rees* (1) the decisions were on instruments mortgaging personal chattels only, and do not touch the point raised here. In *In re Burdett, Ex parte Byrne* (4), the Court of Appeal held, where personal chattels and other property were mortgaged, that the deed was valid in respect of the other property, though, not being in the statutory form of a bill of sale, it was void in respect of the personal chattels. In *In re Willis, Ex parte Kennedy* (2), Cave, J., pointed out (p. 387) that there was nothing in s. 6 to make the attornment itself void, and said that he could not see how in that case it could come within s. 6, because no personal chattels had been seized or taken under the distress. *Daubuz* v. *Lavington* (5) decided that Order III., r. 6, and Order XIV., r. 1, applied where the relation of landlord and tenant was created by an attornment clause in a mortgage deed.

(1) 17 Q. B. D. 408.
(2) 21 Q. B. D. 384.
(3) 13 App. Cas. 506.
(4) 20 Q. B. D. 310.
(5) 13 Q. B. D. 347.

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*Hansell*, in reply. *In re Burdett, Ex parte Byrne* (1), was not cited before the House of Lords in *Thomas* v. *Kelly*, (2) and it is inconsistent with the decision in the latter case. In *Daubuz* v. *Lavington* (3) the point arising on the Bills of Sale Act, 1878, s. 6, was not taken.

LORD COLERIDGE, C.J. This case appears to raise a new point. The defendants gave a mortgage in the ordinary form to the plaintiffs to secure an advance of money, and the mortgage deed contained the ordinary attornment clause creating the relation of landlord and tenant between the plaintiff and the defendants, and no doubt as incident to the relation so created the landlord has power to distrain for rent in arrear. It is admitted that Order XIV. applies to this case; that rent is in arrear, and that the attornment clause, as it stands, does create the relation of landlord and tenant; but it is said that the attornment clause is made a bill of sale by the terms of s. 6 of the Bills of Sale Act, 1878; that not being registered as a bill of sale, and not being in the form in the schedule of the Bills of Sale Act, 1882, it is void by s. 9 of that Act. We have, then, to say whether the attornment clause is wholly void as a bill of sale. By the terms of s. 6 of the Act of 1878, "every attornment, instrument, or agreement, not being a mining lease, whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any advance, shall be deemed to be a bill of sale within the meaning of this Act." It is to be observed that the words are "shall be deemed to be," not "shall be," and it is to be deemed to be a bill of sale "of any personal chattels which may be seized or taken under such power of distress." Granting that it is an attornment whereby a power of distress is given by way of security for an advance, and granting that it would be void as a bill of sale in respect of any personal chattels seized or taken under the power of distress, I am of opinion that, where no personal chattels are seized or taken, s. 6 does not affect the operation of the attornment clause in so far as it creates the relation of landlord and tenant between mortgagee and mortgagor.

(1) 20 Q. B. D. 310 (2) 13 App. Cas. 506.
(3) 13 Q. B. D. 347.

It has no application where no personal chattels are seized or taken. The words of the proviso at the end of s. 6 are puzzling perhaps. In *In re Willis, Ex parte Kennedy* (1), the proviso was held to apply only where the mortgagee, under a mortgage of land, has taken possession and then demised the premises to the mortgagor, and not to apply to cases in which the demise is created by an attornment clause in the mortgage deed itself. But the proviso and the decision upon it do not affect our construction of the operative part of the section. They have no bearing upon the point before us, which arises before any question of seizing or taking goods has arisen, and can therefore be decided without any reference to the proviso.

It was admitted by counsel for the defendants that there was no case which had in terms decided that an attornment clause in a mortgage of land was rendered void for all purposes by s. 6 of the Act of 1878, and s. 9 of the Act of 1882, but it was said that the result of the cases was to shew that in principle his contention was right, because it had been held that the effect of the Bills of Sale Acts was to make the attornment clause invalid in respect of goods seized and taken under it, and that, as it could not be severed, it must be rendered invalid altogether; so that the plaintiffs cannot rely upon it for any purpose. The answer, to my mind, is clear and conclusive. It is, that the Bills of Sale Acts are not pointed at, and do not include within their scope and operation real property. They are pointed at assignments of personal property, and the mischief arising from a state of things which enables one man to get credit for being the owner of personal chattels by keeping them in his possession whilst another man is the real owner of them. To remedy that state of things is an intelligible object, and it is pointed out by Lindley, L.J., in *In re Willis, Ex parte Kennedy* (1), as being the real object of the Bills of Sale Acts, which have not in terms interfered with real property, and did not intend to interfere with it. This is the ordinary attornment clause inserted in mortgages of real property, and I am of opinion that s. 6 does not apply to make it invalid for the purpose for which the plaintiff relies upon it.

(1) 21 Q. B. D. 384.

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Lord Coleridge, C.J.

WILLS, J. I am of the same opinion. I cannot agree with the argument—clear and able as it was—of the defendants' counsel. His contention was that no attornment clause in a mortgage of lands can be any longer supported because it comprehends a power of distress of personal chattels by way of security for an advance, and as in its nature it is incapable of being drawn in the statutory form of a bill of sale, it is therefore altogether void. That seems a startling proposition. It is scarcely to be supposed that parliament could have intended to adopt legislation which would affect nearly every mortgage security to so alarming an extent without using words which would plainly and obviously have that effect. An attornment clause, to my mind, consists of two things perfectly severable. It creates the relation of landlord and tenant between mortgagee and mortgagor, and it gives the mortgagor a power of distress as a right incident to that relation. In so far as it creates the relation of landlord and tenant it is a matter affecting the real estate. In so far as it gives power to distrain personal chattels, it is a bill of sale, and in that respect void by the operation of the Bills of Sale Acts.

The words of s. 6 of the Act of 1878 are, that it "shall be deemed to be a bill of sale, within the meaning of this Act, of any personal chattels which may be seized or taken under such power of distress." I do not think that section applies to this case. The meaning is that in so far as the attornment clause gives a right to seize or take personal chattels it is a bill of sale, and therefore void; but I cannot see why it should be taken to be a bill of sale for the purpose of destroying the relation of landlord and tenant. The case of *In re Burdett, Ex parte Byrne* (1), has some bearing upon the matter. There the grantor assigned personal chattels and also a gas-engine. The Court of Appeal held, that in so far as regarded the personal chattels the instrument was void as a bill of sale, but that it was not void in respect to the gas-engine because that was not a personal chattel within the definition clause in the Act of 1878. I think it is equally right to say here that the attornment clause is not made a bill of sale so far as regards the relation of landlord

(1) 20 Q. B. D. 310.

and tenant, it is only made a bill of sale in respect of personal chattels seized or taken under the power of distress.

*Judgment for the plaintiff.*

Solicitors for plaintiff: *Snow, Snow, & Fox.*

Solicitors for defendants: *Davidson & Morriss.*

W. A.

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[IN THE COURT OF APPEAL.]

*April* 18, 25, 28.

IN RE BARKER. EX PARTE CONSTABLE.
IN RE JONES. EX PARTE JONES.

*Bankruptcy—Discharge of Bankrupt—Power of Court to refuse, suspend, or impose Conditions—Circumstances to be taken into consideration—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 28.

Under s. 28 of the Bankruptcy Act, 1883, the Court has an unlimited discretion to grant or refuse a bankrupt his discharge, or to suspend the discharge, or to grant a conditional discharge, except in the cases in which that discretion is expressly limited by the proviso to s. 28.

In the exercise of that discretion the Court may take into consideration any conduct or affairs of the bankrupt relevant to the bankruptcy, and is not limited to the consideration of the matters mentioned in sub-s. 3 of s. 28 or in s. 24.

*In re Betts & Block* (19 Q. B. D. 39) explained.

IN RE BARKER.

APPEAL by a creditor against an order of a registrar granting an unconditional order of discharge to A. H. Barker, a bankrupt.

From the report of the official receiver the following facts appeared:—

The debtor was a professional jockey. A receiving order was made against him on his own petition on December 4, 1889. By his statement of affairs, submitted on December 11, his liabilities were shewn to amount to 1369*l.* 10*s.* 1*d.*, his creditors being sixteen in number. Proofs were made by nine creditors for sums amounting in the whole to 1214*l.* 16*s.* 10*d.* The debtor estimated his assets at 350*l.* On the application of the official receiver an order was made on December 12 for the administration of the estate in a summary manner, pursuant to s. 121 of the Bankruptcy Act, 1883. On December 17 an order was made adjudging the debtor a bankrupt. At the first meeting of the creditors on January 7, 1890, no resolution was passed. In his

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public examination the bankrupt stated that in March, 1889, he was engaged in riding in Hungary, and that the asset of 350*l.*, mentioned in his statement of affairs, consisted of a claim against a gentleman who employed him to train and ride his horses in Hungary from March to November, 1889. The official receiver had not at the date of his report (February 18, 1890) received any part of this debt. The bankrupt attributed his failure wholly to his liability under a judgment for 1000*l.* damages, and costs 59*l.* 3*s.* 2*d.*, obtained against him in April, 1889, in an action for breach of promise of marriage brought against him by a Miss Constable.

The official receiver reported that he was not aware of evidence establishing any of the facts mentioned in s. 28, sub-s. 3, of the Bankruptcy Act, 1883, or tending to prove that the bankrupt had committed any misdemeanour under that Act or Part II. of the Debtors Act, 1869, or any amendment thereof.

The bankrupt applied for an order of discharge, and his application was opposed by Miss Constable, who desired that some condition should be imposed. The registrar granted an unconditional discharge. Miss Constable appealed.

April 18. *Muir Mackenzie*, for the appellant. The order ought to have been made subject to the condition that the bankrupt should consent to judgment being entered against him by the trustee for at least 200*l.* The registrar held that, upon the question of granting the bankrupt a discharge, he could not take into consideration any conduct of the bankrupt, except the matters which are mentioned in sub-s. 3 of s. 28 of the Bankruptcy Act, 1883, and that, if the bankrupt has not been guilty of any of the offences there mentioned, and except in those cases in which the Act expressly provides that an absolute discharge is not to be granted, he has an absolute right to an unconditional discharge. This is not the right construction of s. 28. It gives a very wide discretion to the Court, and the proviso at the end of sub-s. 2 cuts down that discretion in certain cases only. *In re Betts & Block* (1), rightly understood, is not inconsistent with this view. The registrar ought to have admitted evidence

(1) 19 Q. B. D. 39; 13 App. Cas. 570.

of the bankrupt's earnings; but he refused to do so. He is supposed to earn a large income by his occupation, though he has no realized assets. *In re Bullen* (1) and *In re Shackleton* (2) are authorities in favour of the wide discretion of the Court.

*Herbert Reed*, for the bankrupt. Since the decision in *In re Betts & Block* (3), it has been considered by the registrars of the London Court of Bankruptcy that, upon an application for the discharge of a bankrupt, they cannot take into account conduct of the bankrupt other than the matters mentioned in sub-s. 3 of s. 28, or in s. 24. The words of sub-s. 2, no doubt, at first sight appear to give a larger discretion; but the judgments of this Court and of the House of Lords in that case have put a narrower construction upon them. A similarly restricted construction was put on s. 159 of the Bankruptcy Act, 1861, in *In re Mew & Thorne.* (4) The discretion is a judicial one, and the Court is entitled to take into consideration only such conduct of the bankrupt as is mentioned in sub-s. 3 of s. 28, or s. 24, and his "affairs" as bearing upon and explaining his conduct. The bankrupt cannot be required to consent to judgment being entered against him for the purpose of putting a screw on his relations. The policy of the Act is to set insolvent debtors free from their liabilities. The proviso to sub-s. 2 must be read with the prior enacting part, for otherwise the Court would have an unlimited discretion. The judgments both of the Court of Appeal and of the House of Lords in *In re Betts & Block* (3) lead to the conclusion that the discretion of the Court is limited in the way already suggested. The Court cannot set aside the prospective and contingent earnings of a professional man for the benefit of his creditors: *Ex parte Benwell.* (5)

*Muir Mackenzie*, in reply. The fact that the Court cannot make an order setting aside contingent professional income of a bankrupt is a reason for granting him an order of discharge subject to a condition which may have the effect of rendering his future income available for his creditors.

*Cur. adv. vult.*

(1) 5 Mor. Bky. Cas. 243.
(2) 6 Mor. Bky. Cas. 304.
(3) 19 Q. B. D. 39; 13 App. Cas. 570.
(4) 31 L. J. (Bkcy.) 67.
(5) 14 Q. B. D. 301.

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APPEAL against a decision of the Queen's Bench Division (Cave and A. L. Smith, JJ.) (1), affirming an order of the judge of the county court at Wrexham, by which he granted an order of discharge to Griffith Jones, a bankrupt, subject to the condition of his consenting to judgment being entered against him by the trustee for 250*l.* In July, 1885, the bankrupt was defendant to an action for breach of promise of marriage in which the plaintiff recovered judgment for 500*l.* In January, 1886, the bankrupt's father died, leaving behind him personalty valued for probate duty at 2315*l.*, and real property worth 1300*l.* or 1400*l.* more. By his will, made five days before his death, all his children took substantial benefits except the bankrupt, to whom a legacy of 10*l.* only, payable on his mother's death, was left. On April 11, 1889, a receiving order was made against the bankrupt on his own petition. There were practically no assets, and the only creditor was the plaintiff in the breach of promise action, who proved for 596*l.*, made up of damages, costs, and interest on the judgment debt. Shortly before the bankruptcy petition was filed the bankrupt's family offered the plaintiff 250*l.* in satisfaction of her judgment, which however was refused. Upon these facts the judge gave the bankrupt an order of discharge, subject to his consenting to a judgment for 250*l.* being entered up against him, such judgment to be deemed to be satisfied if the bankrupt paid the official receiver 200*l.* within a month.

The report of the official receiver contained the following statements:—

"The bankrupt does not appear to have committed any misdemeanour under the Bankruptcy Act, 1883, or the Debtors Act, 1869.

"The bankrupt states that at the date of the promise of marriage, and afterwards till the date of his father's death, he lived with his father, managing a farm for him, receiving no regular wages, but getting his board and lodging, pocket-money, and clothes provided. He anticipated that his father would

(1) 24 Q. B. D. 589.

place him in a position to be married. His father was displeased with his choice, and, at his request, the bankrupt broke off the engagement. The creditor stated, on the sheriff's inquisition as to the damages, that the bankrupt had told her that his father had promised him 1500*l.* if he would break off the engagement.

"The bankrupt was present, but he did not go into the box to deny this statement. He now denies that he told the creditor that his father had promised him any sum.

"The bankrupt continued to live with his father after the judgment in the breach of promise action (July, 1885) up to his father's death on the terms above stated.

"On June 26, 1886, the tenancy of Maesyfallen Farm (which had been held by the father) was transferred to the bankrupt's mother and his brother Robert. His mother resides at and is tenant of the farm of Tynant, and his brother Robert is tenant of and resides at Caodu, Llannwchllyn. The bankrupt resides alone at Maesyfallen Farm, and states that he has no interest in the stock or the tenancy of the farm, but that he manages it for his mother and brother as bailiff, buying and selling stock and general farm produce, and receiving only his board and lodging, clothing, and pocket-money, and 5*s.* a week, which is payable to his creditor under an affiliation order. The bankrupt admitted having purchased a table at an auction, but states that it was purchased for his mother. The bankrupt also purchased in June, 1886, a hay-rake, and to enable him to do so he borrowed 10*l.* from one of his servants (the cost of the hay-rake being 8*l*). He states that the hay-rake belongs to his mother, and that she repaid him the loan of 10*l.* in Christmas, 1886. His explanation of this matter is, that his mother did not wish the hay-rake to be purchased; but that, when she saw it working, she adopted the purchase. This transaction seems to throw doubt upon the debtor's statement as to the tenancy of the farm, and his being without means or property."

1890. April 25. *Cooper Willis, Q.C.*, and *F. Cooper Willis*, for the bankrupt, adduced arguments similar to those adduced on behalf of the bankrupt Barker, citing the same cases. They

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also urged that the depriving a bankrupt of his discharge was in the nature of a punishment for an offence, and that ss. 24 and 28 were intended to shew debtors exactly what offences would render them liable to that punishment. The legislature could not have intended to create offences without defining precisely their nature.

*Muir Mackenzie*, (*Sir E. Clarke, S.G.*, with him), for the official receiver, was called upon only on the question whether the discretion of the county court judge had been rightly exercised.

*Lankester*, for the creditor.

*Cur. adv. vult.*

April 28. LORD ESHER, M.R. The main question is the same in both these cases. In both of them judgment has gone against the bankrupt for a breach of promise of marriage, and considerable damages have been given against him for that breach, and in both cases after the judgment and award of damages the defendant was made bankrupt upon his own petition. In each case the bankrupt defendants applied for an order of discharge in the bankruptcy.

In Barker's case the registrar gave the bankrupt an unconditional discharge, and an appeal was brought by a creditor on the ground that an unconditional discharge ought not to have been granted, but that the registrar ought to have taken into consideration the bankrupt's conduct in respect of the breach of promise of marriage. In the case of Jones the judge of the county court discharged the bankrupt conditionally on his consenting to judgment being entered against him by the trustee for 250*l.* as provided by sub-s. 6 of s. 28 of the Bankruptcy Act, 1883. It was objected by the bankrupt, that the judge had no right to take into consideration the breach of promise of marriage, and that he could not act upon anything but the matters which are mentioned in s. 28, of which this was not one.

Now in both cases the judgment debt in respect of the breach of promise of marriage was the main cause of the bankruptcy; in the case of Jones it was the sole cause. Indeed, I think I should not be wrong in saying that, inasmuch as in both cases the adjudication was made upon the petition of the debtor himself,

the sole cause of the bankruptcy petition was in both cases the judgment in the breach of promise action and the non-payment of the damages under it. The question raised depends upon what is the true construction of s. 28 of the Bankruptcy Act, 1883. Does that section give the Court power, when it has to determine whether a discharge shall or shall not be granted to a bankrupt, to take into consideration any other facts than those which are mentioned in the proviso to that section? May the Court consider other conduct and affairs of the bankrupt than what is mentioned in the proviso? May the Court consider the state of the bankrupt's affairs on other grounds, and act upon that consideration? Has the judge a discretion? If he may act upon other conduct and upon the state of the bankrupt's affairs other than the matters mentioned in sub-s. 3 of s. 28, is there any restriction with regard to the conduct and affairs which he may consider? These, I think, are the questions raised.

Now, as to the point whether the judge may consider other conduct and other affairs than those mentioned in sub-s. 3, it seems to me perfectly clear upon the construction of s. 28 that he may. It is that section which enables the bankrupt to apply for a discharge and empowers the Court to grant it. Sub-s. 2 says, that "on the hearing of the application the Court *shall* take into consideration a report of the official receiver as to the bankrupt's conduct and affairs." The language is imperative; the Court shall take the report into consideration, though it does not say that the Court shall act upon that report and that only. Then sub-s. 2 goes on, "and *may*" (not *shall*)—"and may either grant or refuse an absolute order of discharge, or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or with respect to his after acquired-property." Stopping there, and construing the words according to the ordinary grammatical and idiomatic meaning of the English language, there cannot be a doubt that they give the Court a discretion. The judge "shall" take into consideration the report, but there is no enactment that he shall act upon that report and that only; the enactment is, in the ordinary terms by which a discretion is given, that he may

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either grant or refuse the discharge—indeed, it is even stronger than that, for he may do one of several enumerated things, and amongst others he may make a conditional order of discharge. After that almost indefinite discretion which is given by the word "may," there comes a proviso. Now, the ordinary and proper function of a proviso coming after a general enactment is to limit that general enactment in certain instances. No doubt sometimes a proviso has been used in Acts of Parliament and in other documents to enlarge a previously given discretion; but that is not its proper function. In the present case it seems to me clear that the proviso limits in certain cases the unlimited discretion which is given by the former part of sub-s. 2. It begins, "provided that the Court *shall*," and it therefore takes away the discretion in the cases which are about to be mentioned, except so far as a discretion is given by the proviso itself. "Provided that the Court shall refuse the discharge in all cases where the bankrupt has committed any misdemeanour under this Act, or Part II. of the Debtors Act, 1869, or any amendment thereof, and shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge subject to such conditions as aforesaid." In the cases there mentioned, an unconditional discharge cannot be given. There are other things which the judge may do; but in the specified cases he cannot give the bankrupt an unconditional discharge, although under the former part of sub-s. 2 the judge has a discretion to give an unconditional discharge whenever he thinks it right to do so.

Then the facts referred to in the proviso to sub-s. 2 are mentioned in sub-s. 3, and they are, that the bankrupt has omitted to keep proper books of account, that he has continued to trade after knowing himself to be insolvent, and so on. None of them apply to this judgment for breach of promise of marriage.

Upon the construction of s. 28 alone, it seems to me clear beyond doubt that an unlimited discretion is given to the judge by the first part of sub-s. 2, and that the proviso limits that discretion in certain cases, but that in any case which is not within those mentioned in the proviso the discretion remains unlimited. Sub-s. 6 of s. 28 has also been referred to. It provides, that "the

Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge; but in such case execution shall not be issued on the judgment without leave of the Court, which leave may be given on proof that the bankrupt has since his discharge acquired property or income available for payment of his debts,"—and this is the condition which in Jones's case the registrar has, in the exercise of his discretion, imposed. I have no doubt that in both the cases the judge had a discretion, and that he was entitled to consider the judgment for breach of promise of marriage and the non-payment of the damages under it.

Does it follow that the judge may take into consideration upon the application for a discharge everything which has been done by the bankrupt during his past life? It seems to me that there must be some limit; and I think the judge ought not to take into his consideration conduct which could not have had anything to do with the bankruptcy, either in producing it or in affecting it in any way after its commencement. For instance, a judgment for breach of promise of marriage which had occurred years before, and after which the debtor had begun to trade, a judgment for breach of promise of marriage when the non-payment of the damages could have had nothing whatever to do with producing the bankruptcy, ought not to be taken into consideration. Only such conduct or affairs as may or can have had some effect upon the bankruptcy itself ought to be taken into consideration.

It is said that my brother Lopes laid it down distinctly in *In re Betts & Block* (1), that no judgment for breach of promise of marriage can be taken into consideration upon the question of granting a bankrupt his discharge. I do not think his words convey that meaning, and I am sure that he never intended to say that no judgment for breach of promise of marriage should under any circumstances be taken into consideration. What he meant was what I have already said,—that a breach of promise of marriage, or non-payment of damages in respect of it, which had

(1) 19 Q. B. D., at p. 47.

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nothing to do with producing the bankruptcy, ought not to be taken into account any more than any other conduct which had nothing to do with the bankruptcy. And as to the language which I then used, it must be construed with reference to the facts then before the Court, and I know that I meant exactly what I have just been saying, viz., that the Court cannot take into consideration immorality or any other misbehaviour of the bankrupt which has had and could have had nothing to do with the bankruptcy. Anything which has to do with the bankruptcy can be taken into consideration.

In both the cases now before us the judgment for breach of promise of marriage, and the non-payment of damages under it, manifestly had something to do with the bankruptcy—they produced the bankruptcy. Under those circumstances, in my opinion, the judge in each case had a right to consider this matter, and a discretion to act upon that consideration. In Barker's case the registrar exercised his discretion by giving the bankrupt an unconditional discharge. I can see no ground for saying that he exercised his discretion wrongly, and I think we cannot interfere with it.

In Jones's case it is said that the county court judge exercised his discretion wrongly. He was bound to take into consideration the report of the official receiver; he was not bound to act upon it, but he was entitled to do so. And when I look at the report of the official receiver, I cannot but come to the conclusion that the county court judge was entitled to take that view of the case which he has taken. The father of the bankrupt was a well-to-do Welsh farmer. He had several children, and amongst others this young man. The action for breach of promise was brought and the damages recovered during the father's lifetime. Then the father, who had more than one farm and considerable property, made his will (at least, I think the county court judge came to the conclusion that in all probability he did) with the desire to defeat the law if he could, and he left this son, according to the words of the will, without a shilling at present. He left to each of his other children some farm or property. It is said that he left this son without a shilling, never meaning him to have a shilling, and that the bankrupt's mother

and brother had put him into a farm as bailiff at a salary of about 15*l.* a year and his board and lodging, that he was managing the farm for some years, and that he was not to have the profits, but was to receive nothing but the 15*l.* and his keep. I think the county court judge saw that this was a family manœuvre, and that the farm is really the bankrupt's, and that he is working it for his own profit. The county court judge has acted upon that view, and I cannot say that he has exercised his discretion wrongly in so doing, and in treating the case as if the farm were really the bankrupt's; so that in all probability he will be able to at some time pay the 250*l.* I cannot, therefore, say that the discretion has been exercised wrongly; in fact, I think it was exercised quite rightly. It must be borne in mind that the judgment cannot be put in force unfairly; it cannot be put in force without the leave of the Court; and, if the bankrupt somehow or other manages to accumulate 250*l.*, or if hereafter the farm is declared to be his, he will easily find the 250*l.*, if he cannot find it now.

I am of opinion that both the appeals must be dismissed.

FRY, L.J. The question of construction involved in this case is one as to which, I believe, a great diversity of opinion has existed among the county court judges; and, as the matter is one of considerable importance, I will express in my own words the view which I take of the construction of the statute.

Sect. 28 of the Bankruptcy Act of 1883 begins with providing, that "a bankrupt may, at any time after being adjudicated bankrupt, apply for an order of discharge"; but "the application shall not be heard until the public examination of the bankrupt is concluded." That is not unimportant as throwing some light on the question which we have to determine, viz., whether, according to the true construction of the section, the judge may consider all relevant circumstances, or whether, in the exercise of his discretion under this section, he is confined to considering the misdemeanours or offences or facts mentioned or referred to in the proviso to sub-s. 2. It appears to me that the postponement of the hearing of the application till after the public examination is concluded tends to shew that the informa-

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tion obtained at the public examination was considered by the legislature as possibly important with regard to the exercise of the discretion given to the judge, the debtor being bound at his public examination to give such information as the Court may require.

Then sub-s. 2 provides, that "on the hearing of the application the Court shall take into consideration a report of the official receiver as to the bankrupt's conduct and affairs." Those words are very large. I entirely agree that there may be "conduct," and also "affairs" which may be immaterial and irrelevant for the consideration of the Court; but I think that all conduct and all affairs, the knowledge of which may tend to assist the judge in the exercise of the discretion vested in him by this section, are matters upon which the official receiver may report.

The Court must take that report into consideration; and then the sub-section goes on to vest, as it appears to me, a clear discretion in the judge, because, when he has taken that report into consideration, he may do one or other of four specified things. He may either grant the bankrupt an absolute unconditional discharge, or he may grant a discharge and suspend its operation for a specified time, or he may grant a discharge subject to certain conditions, or, lastly, he may refuse to give any discharge at all. No doubt there is an obligation on the judge to do one or the other of those four things; but the words plainly give him a discretion as to which of the four he shall do.

Then comes the proviso, which is a double one. In the first place, it deals with misdemeanours "under this Act or Part II. of the Debtors Act, 1869," and, when it is proved that the bankrupt has committed any of those misdemeanours, the discretion of the Court is absolutely taken away; it is bound to refuse the discharge. That is the first part of the proviso. The second is, that "on proof of any of the facts hereinafter mentioned," that is, in sub-s. 3, the Court is prevented from giving an absolute discharge, but is at liberty to adopt any of the other three alternatives. It may either refuse the discharge, or suspend it, or grant it subject to conditions. The effect of that proviso is, to my mind, very plain indeed. In certain contingencies it takes away all discretion from the Court; but I think that the reference

to the facts mentioned in sub-s. 3 was not intended to fetter the discretion of the Court, except to the extent to which it is expressly fettered by the words which I have read.

I will not go through the facts which are mentioned in sub-s. 3; but, passing on to sub-s. 5, I may observe that it empowers the Court at the hearing of the application for a discharge to "put such questions to the debtor and to receive such evidence as it may think fit." For what purpose is the Court to put these questions and to receive this evidence? Because, as it seems to me, there might be circumstances outside the misdemeanours mentioned, or the facts referred to, which, nevertheless, might be material to the exercise of the discretion which is vested in the judge, and, in my opinion, the only limit to the evidence which may be received is to be found in its relevancy to the exercise of that discretion.

Then sub-s. 6 says, that "the Court may, as one of the conditions referred to in this section, require the bankrupt to consent to judgment being entered against him by the official receiver or trustee for any balance of the debts provable under the bankruptcy which is not satisfied at the date of his discharge." If the discretion is to be exercised only in the limited way which has been suggested, one may well inquire, What can be the misdemeanours or the facts which should induce the Court to require the bankrupt to consent to such a judgment? What relation could there be between entering up such a judgment and the committing of a misdemeanour? It was admitted by the bankrupt's counsel during the argument that there could be none. In my opinion, whenever the Court sees that it would be equitable and reasonable to require a bankrupt, as a condition of obtaining a discharge, to consent to judgment being entered against him, the Court has a discretion which it can exercise, without being in any way fettered by the proviso.

I think, therefore, that in each of the cases now before us the registrar or the county court judge had a discretion as to the granting of the bankrupt's discharge.

With regard to the second question which arises in each case, viz., the mode in which the discretion ought to be exercised—in Barker's case I cannot see any circumstances sufficient to induce

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us to interfere with the decision of the registrar. I believe he acted rather upon the view that he had no discretion than that he ought to exercise his discretion in the manner in which he did. But, although the petition was presented by the debtor himself, there are other creditors beside the plaintiff in the breach of promise action, and there are no circumstances of suspicion as to the propriety of his conduct. I think, therefore, that there is no ground for interfering with the registrar's order.

With regard to Jones's case, I entirely agree in the view which the Master of the Rolls has already expressed of the real nature of that case. I think that the bankrupt has been guilty of very wicked conduct. By means of the bankruptcy petition and an arrangement between himself and the members of his family, he has devised a scheme to defeat the judgment obtained by the woman to whom he had not only broken his promise of marriage, but whom he had seduced. We are asked to believe that he has nothing but the sum of 5*s.* a week, which under an affiliation order he is bound to pay her. But, when we see that he has purchased an expensive agricultural machine in his own name, in the expectation only, as he says, that his mother would adopt the purchase, all I can say is, that I share the doubts which have been expressed by the official receiver, and I do not believe the story told by the bankrupt.

I think, therefore, that both the appeals must fail.

LOPES, L.J. When s. 28 is read with a willing mind it is not, in my opinion, difficult to construe. I think the first part of sub-s. 2 gives an absolute discretion to the judge to deal with the matter in one of the four ways mentioned. Then comes the proviso, which places a fetter upon the exercise of that discretion in the cases which are there specified. My view of the true construction of sub-s. 2 is strengthened by sub-ss. 5 and 6. *In re Betts & Block* (1) was relied upon by Mr. Cooper Willis; but, I think, if that case is carefully read, it in no way assists his argument. It was there decided that the conduct of the bankrupt in not submitting himself to a medical examination with a view to

(1) 19 Q. B. D. 39.

the effecting of an insurance on his life was not conduct which the judge could take into consideration on an application for the bankrupt's discharge. Some expressions which I made use of in my judgment were relied upon; but they cannot, I think, bear the construction which has been placed upon them. I adhere to every word which I then used. I then said (1): "In my opinion the word 'conduct' in s. 28 does not include what I will call general misconduct. For instance, it could not, I imagine, be said to include immoral conduct, however culpable or however unreasonable. Nor again, in my opinion, would it include a breach of an obligation not connected with the bankruptcy—such, for instance, as a breach of promise to marry, however dishonourable and however unreasonable the conduct of the bankrupt in that respect might be. I think 'conduct' in s. 28 must be construed by reference to s. 24 of the Act which defines the duties of the debtor 'as to the discovery and realization of his property.' Now, that being so, the question arises, Is this refusal to submit to a medical examination by the bankrupt an act or thing in relation to his property contemplated by that section? In my opinion, it is not. It is refusing to do an independent and collateral act by which his property may acquire an enhanced value. I cannot think that such an independent transaction was contemplated by this section." What I meant was, that "conduct" outside the bankruptcy was not to be considered on an application for the bankrupt's discharge. The conduct of the bankrupt in each of the cases now before us in relation to the judgment for breach of promise of marriage was not outside the bankruptcy; it was, in fact, the very foundation of the bankruptcy. I think, therefore, that in both cases the judge had a discretion, and that he properly exercised that discretion.

*Appeals dismissed.*

Solicitors: *Miller, Smith, & Bell; G. L. P. Eyre & Co.; Rooks & Co.; Solicitor to Board of Trade; Morgan, Son, & Upjohn.*

W. L. C.

(1) 19 Q. B. D. at p. 47.

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July 2, 3.

READ v. JOANNON.

*Bill of Sale—Registration—Debenture of Incorporated Company—Validity of as against Execution Creditor—Bills of Sale Act*, 1878 (41 & 42 *Vict. c.* 31), *ss.* 4, 8—*Bills of Sale Act*, 1878 (*Amendment Act*, 1882) (45 & 46 *Vict. c.* 43), *ss.* 3, 17.

The Bills of Sale Act, 1878, does not apply to a debenture of an incorporated company; but assuming that it did, the effect of s. 17 of the Bills of Sale Act, 1882, is to render it unnecessary that such a debenture should be registered as a bill of sale.

APPEAL from the City of London Court.

This was an interpleader issue. The defendant in the issue had recovered judgment for a sum of 36*l.* against a company incorporated under the Joint Stock Companies Acts called the Cigarette Supply Company, Limited. The sheriff having sold certain goods of the company in execution of the judgment, the plaintiff in the issue claimed the proceeds of such sale as being the holder of a debenture of the company for 1500*l.*, which debenture was expressed to charge by way of floating security the undertaking and all real and personal property then or any time thereafter belonging to the company. The debenture was not registered as a bill of sale. At the trial of the issue the judge held that the debenture was a bill of sale within the definition of that term in s. 4 of the Bills of Sale Act, 1878, and that the necessity for the registration of debentures under that Act as against execution creditors was unaffected by the provisions of the Bills of Sale Act, 1882. He accordingly held that the debenture was void as against the defendant for want of registration. The plaintiff appealed.

*Bassett Hopkins*, (*H. Kent*, with him), for the plaintiff. A debenture of an incorporated company is not a bill of sale within the meaning of the Act of 1878; it is not within the mischief against which that Act was directed. In *Debenture Holders of John Welsted & Co.* v. *Swansea Bank* (1) Pollock, B., held that such debentures were not void as against execution creditors for want of registration.

(1) 5 Times L. R. 332.

But even if debentures were originally within the operation of that Act they are so no longer; for s. 17 of the Bills of Sale Act, 1882, provides that "nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital, stock or goods, chattels, and effects of such company." And by s. 3 of that Act it is provided that it "shall, so far as is consistent with the tenor thereof, be construed as one with the principal Act." The effect of those two clauses is to exclude debentures from the operation of the Act of 1878.

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*Dickens*, for the defendant. Before the passing of the Act of 1882 a debenture in this form was clearly a bill of sale within the Act of 1878, by s. 4 of which, "The expression 'bill of sale' shall include . . . . any agreement . . . . by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred." That is exactly what this debenture confers. If, therefore, the Act of 1878 stood alone, this debenture being unregistered would be void as against the defendant. The question is, whether the Act of 1882 has altered the law in that respect. It is contended that s. 17 has not that effect. For in the first place, the words "or other incorporated company" are limited to companies ejusdem generis with mortgage and loan companies: see per Grove, J., *Jenkinson* v. *Brandley Mining Co.* (1); and the company in the present case is not of that character. Secondly, that section only limits the application to debentures of the provisions contained "in this Act"; it does not affect the application of the earlier Act. Throughout the later Act a marked distinction is drawn between "this Act" and "the principal Act."

The object of the earlier Act was to give information to the public as to the pecuniary position of the grantor; that of the later Act was to protect the grantor himself against his own weakness, and for that purpose it was provided that bills of sale should be void even as against the grantor unless they were in the simple form given in the schedule. The legislature having so provided, it became necessary to exempt debentures of companies from the operation of that provision; for on the one hand

(1) 19 Q. B. D., at p. 571.

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it was impossible for a debenture to be in the statutory form, and on the other hand incorporated companies did not belong to the class of persons whom it was sought to protect. Accordingly s. 17 was introduced. But that section is a qualification only upon the extension of the law introduced by the later Act in favour of grantors. It leaves the law, so far as it avoided unregistered debentures as against execution creditors, as it stood before 1882. In *Ross* v. *Army and Navy Hotel Co.* (1) it was indeed held that a debenture was not void for want of registration; but then the question arose as between grantee and grantor, and consequently s. 17 applied. And Kay, J., said, obiter, that s. 17 did not apply to the Act of 1878 (p. 51). In *Jenkinson* v. *Brandley Mining Co.* (2), where the question arose as between grantee and execution creditor, the Court held that a mortgage deed, securing the repayment of money borrowed on debentures, being unregistered, was void. The case of *Ross* v. *Army and Navy Hotel Co.* (1) was there expressly distinguished on the ground of the difference of the parties, Grove, J., pointing out that, if a debenture needed no registration against an execution creditor, "a company would be enabled to entirely evade all the wholesome requirements of the Bills of Sale Acts, and if they wished to obtain goods and avoid paying for them, they would only have to issue debentures to any one they pleased, and get the holders to set up their claims against those of the genuine creditors" (p. 571). In *Edmonds* v. *Blaina Furnaces Co.* (3) and in *Levy* v. *Abercorris Slate and Slab Co* (4) Chitty, J., held, debentures of companies which were not mortgage or loan companies to be within the operation of s. 17.

*Bassett Hopkins*, in reply.

LORD COLERIDGE, C.J. This is certainly an example of the occasional truth of Lord Westbury's famous observation, that he wished there were no cases; for, if one looks at the Act of Parliament by itself, nothing, as it seems to me, could be plainer. No doubt if there have been decisions on the point, whether by a court of appeal or by a court of co-ordinate jurisdiction, we

(1) 34 Ch. D. 43.
(2) 19 Q. B. D 568.
(3) 36 Ch. D 215.
(4) 37 Ch. D. 260.

have no right to disregard them, but must construe the Act according to the interpretation which the judges have put on it. But I have carefully looked at the judgments in the cases which have been cited to us, and, so far as I can see, there is not one of them with which our present judgment in any manner conflicts. The question is, whether a debenture of an incorporated company requires registration as a bill of sale. I am of opinion—and I think it right to say that my opinion does not stand alone, but is supported by that of a judge of much greater authority than myself, whom I have had the opportunity of consulting—that such debentures are not bills of sale, and are not struck at by either of these Acts of Parliament—that they never were within the Act of 1878, and are expressly exempted from the operation of the Act of 1882. I agree in theory with much of the argument for the defendant, that, for certain purposes, the Acts of 1878 and 1882 must be read separately. The Act of 1882 provides that, where it is necessary to read them separately, they shall be so read; but the Act does not provide that in every respect they shall be treated as different Acts; on the contrary, it expressly enacts that, so far as is possible, they shall be read as if they were one Act.

The Act of 1882 expressly exempts debentures from its operation, and it was necessary for the defendant's counsel to give some effect to that exemption. The effect which he proposed to give to it was this: he said that, whereas the Act of 1878 required a bill of sale to be registered, the Act of 1882 required it to be registered in a particular form; that a debenture could not be in the statutory form, and that, consequently, it was necessary to exempt debentures from the operation of the provisions affecting the form; but he said that the effect of s. 17 went no farther, but left necessity of registration, apart from the question of form, exactly as it stood under the Act of 1878.

My answer to that argument is two-fold. In the first place, I asked in vain for a case or dictum which said in terms that debentures of incorporated companies were bills of sale requiring registration under the Act of 1878. No such case was produced. Cases were indeed cited, from certain dicta contained in the

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judgments in which, it was argued, that the judges who decided them must have so thought. Whether they thought so or not, they certainly did not so hold; and, so far as I am aware, no case can be produced in which it has ever been held that a debenture of an incorporated company—a perfectly well-known instrument—was a bill of sale within the Act of 1878. Therefore, the first broad answer is, that even if the Acts of 1878 and 1882 are to be read separately to the extent contended for, still the argument fails, the earlier Act having no application to such debentures.

But, secondly, there is a still more conclusive answer. Sect. 17 of the Act of 1882 expressly provides that, "Nothing in this Act shall apply to any debentures issued by any mortgage, loan, or other incorporated company, and secured upon the capital stock, or goods, chattels, and effects of such company." Now I pass by, with respectful difference, the dictum—for it is no more than a dictum—of my brother Grove, that an incorporated company, in that section, must mean a company incorporated for the purpose of mortgage or loan, or for some other purpose in pari materiâ. I do not agree with that dictum, and in that disagreement I do not stand alone, because one of my learned Brothers in the other Division has twice treated the section as applying to debentures of incorporated companies generally. I am, therefore, not without authority in saying that that dictum is not to be taken as law. "Nothing in this Act shall apply to any debentures" It seems clear, when one looks at the language of s. 3 of the Act of 1882, that, even if debentures had originally been within the operation of the Act of 1878, s. 17 is quite sufficient to take them out of that operation, because s. 3 requires that the two Acts shall, as far as is consistent, be construed as one Act; so that the words of s. 17, "nothing in this Act," really mean that "nothing in this Act or in the principal Act" shall apply to debentures.

I have, therefore, come to the conclusion that the decision of the learned judge in the Court below was wrong, and that this appeal must be allowed.

WILLS, J. I am of the same opinion; and I agree with my Lord, upon consideration, that debentures of an incorporated

company are not, and were never intended to be, within the operation of the Act of 1878. But assume that the defendant is right on that point, and that such a debenture was within that Act. It seems to me that this case has been a very signal illustration of the danger, which it is almost impossible to escape, when an Act of Parliament has once become so overladen with decisions as this has been—namely, the tendency to fly at once to the cases without looking at the words of the statute itself; for, when the language of the Act of 1882 is seriously looked at, this case, to my mind, becomes absolutely free from doubt. Sect. 8 of the Act of 1878 said that every bill of sale to which that Act applied should be registered. That section has been in terms repealed, though there is the authority of the cases of *Swift* v. *Pannell* (1) and *Casson* v. *Churchley* (2) for saying that that repeal does not extend to absolute bills of sale, but is confined to bills of sale given by way of security only. But this debenture, if it is a bill of sale at all, is a bill of sale given by way of security only. It is a bill as to which there is no possibility of contending that s. 8 of the principal Act has not been repealed. But if so, then the only enactment requiring a bill of sale of this description to be registered is s. 8 of the Act of 1882. But the moment that is conceded, s. 17 clearly applies; for I entirely agree with what my Lord has said with reference to the impossibility of adopting the view taken by Grove, J., that "other incorporated company" means other incorporated company ejusdem generis with mortgage and loan companies. The words seem to me clearly meant to include every other kind of incorporated company without distinction. Then, if so, there is an express enactment that nothing in the Act of 1882, including s. 8 of that Act, shall apply to such debentures as this.

*Appeal allowed.*
*Leave to appeal refused.*

Solicitor for plaintiff: *Hatt.*
Solicitors for defendant: *G. Kebbell & Miller.*

(1) 24 Ch. D. 210. (2) 53 L. J. (Q.B.) 335.

J. F. C.

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*June* 17.

## HUGHES *v.* SMALLWOOD.

*Landlord and Tenant—Rent in Arrear—Execution against Goods of Third Party—Right of Landlord to claim for Arrears of Rent—County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 160.

By 51 & 52 Vict. c. 43, s. 160, when goods in a tenement for which rent is due are taken in execution under the warrant of a county court, the landlord may claim the rent due to him by delivering a notice to the bailiff making the levy, and such bailiff shall, in making the levy, in addition thereto distrain for the rent so claimed.

Execution having issued upon a judgment in a county court against the defendant, goods belonging to him were taken in execution in a house of which the wife of the defendant was the lessee. The landlords gave to the bailiff making the levy a notice under s. 160 claiming arrears of rent due from the wife:—

*Held*, that, as the defendant's goods were rightfully taken in execution, the claim of the landlords was good.

APPEAL from the decision of the judge of the Stafford County Court in an interpleader issue.

The claimants were landlords of a public-house, of which the defendant's wife was the lessee, and in respect of which there were arrears of rent to the amount of 43*l.* owing from the defendant's wife to the claimants. The plaintiff recovered judgment in the county court against the defendant for 35*l.* for spirits supplied to him, and execution was issued upon the judgment, under which execution the bailiff of the county court seized the goods and chattels of the defendant in the said public-house. Before any sale of the goods and chattels taken in execution, the claimants gave notice to the bailiff under s. 160 of the County Courts Act, 1888, that they claimed 43*l.* for rent in arrear, and the bailiff thereupon distrained the same goods and chattels for the amount of the said rent, in pursuance of the section. The goods and chattels were sold by the bailiff for 25*l.*, and an interpleader issue was tried in the county court to determine the rights of the parties. The county court judge decided in favour of the execution creditor, and the claimants appealed.

*F. Marshall*, for the appellants. The question depends on

s. 160 of the County Courts Act, 1888 (1), which is a reproduction of s. 75 of the County Courts Act, 1856, and the claim of the landlords is distinctly within the language of the section.

It is contended for the execution creditor that the section only applies to cases where the goods taken in execution are the goods of the tenant whose rent is in arrear; but that is not the meaning of the section. The true test is whether the bailiff is lawfully in possession of the goods; if he is, the landlord of the premises upon which the goods are lawfully seized is entitled under the section to claim for his arrears of rent. The cases of *Beard* v. *Knight* (2) and *Foulger* v. *Taylor* (3) are not in point; in both those cases the bailiff had seized the goods of a stranger, and his possession was unlawful, whereas in the present case he was rightly in possession of the goods of the husband at the time when the landlords made their claim for arrears of rent.

*C. C. Scott*, for the execution creditor. The decision of the county court judge was right; otherwise a landlord will under

(1) By 51 & 52 Vict. c. 43 (The County Courts Act, 1888), s. 160: "Section one of the Act of the eighth year of the reign of Queen Anne, chapter fourteen, shall not apply to goods taken in execution under the warrant of the Court, but the landlord of any tenement in which any such goods shall be so taken may claim the rent thereof at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making the levy any writing signed by himself or his agent, which shall state the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due; and if such claim be made, the bailiff or officer making the levy shall, in addition thereto, distrain for the rent so claimed and the costs of such distress, and shall not within five days next after such distress sell any part of the goods taken unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale, next the claim of such landlord, not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case, and, lastly, the amount for which the warrant was issued; and if any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incident to the sale under the execution, and the amount for which the warrant issued; and in either event the overplus of the sale, if any, and the residue of the goods, shall be returned to the defendant . . ."

(2) 8 E. & B. 865; 27 L. J. (Q. B.) 359.

(3) 5 H. & N. 202; 29 L. J. (Ex.) 154.

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this section always be able to get arrears of rent out of the proceeds of an execution against the goods of a person who is an entire stranger to him, merely because the goods were seized in the house in respect of which his tenant has fallen into arrear. The cases of *Beard* v. *Knight* (1) and *Foulger* v. *Taylor* (2) are in favour of the execution creditor, and recognise the fact that the section only applies where the goods seized are the tenant's property, the judgment of the Court of Exchequer in the latter case containing the express statement, that "the whole frame of the section seems directed to the case where the goods levied are the property of the tenant."

*F. Marshall*, in reply, cited *White* v. *Binstead*. (3)

LORD COLERIDGE, C.J. I regret that our decision in this case must be in favour of the appellant. Two cases have been cited to us in which there was a seizure in execution by the bailiff of the county court, followed by a distress by the bailiff for the amount of rent owing to the landlord under the provisions of 19 & 20 Vict. c. 108, s. 75, and it is contended that those cases shew that that section only applied where the goods seized in execution were the property of the tenant of the house in respect of which the rent was owing. Those cases, however, cannot govern the present one; for I think the law is perfectly clear, and it is, that where the execution is rightful, where the bailiff is rightfully in possession of the goods, the landlord has a right to be paid his rent out of the proceeds of the execution, even out of the proceeds of goods belonging to a person who does not owe him anything. It seems quite clear that this is the law, and I most unwillingly give effect to it.

WILLS, J. I share the regret of my Lord that it is impossible to apply the cases which have been cited to us to the facts of the present case. Our decision turns entirely upon the construction of s. 160 of the County Courts Act, 1888, which is a reproduction of s. 75 of the Act of 1856, and, apart from authority, the meaning of that section is absolutely clear. It means that where there is a rightful execution, and the county court bailiff is rightfully in possession of the goods, a distress for the amount of rent due

(1) 8 E. & B. 865; 27 L. J. (Q.B.) 359. (2) 5 H. & N. 202; 29 L. J. (Ex.) 154.
(3) 13 C. B. 304.

(within certain limits which I need not particularize) may be added to the amount of the execution, which distress is to prevail against the claims of the execution creditor. Two cases have been cited to us; but upon the first of these—*Beard* v. *Knight* (1)—it is not possible to place any reliance. The facts were essentially different; the goods seized in execution were those of a stranger, and the bailiff had thereby committed a trespass; this was clearly present to the minds of the judges who decided the case; for, the argument being advanced that the section was for the protection of the landlord, Crompton, J., pointed out that it only applied in the case of goods properly taken in execution. Only a formal judgment seems to have been delivered; but no views were during the argument expressed by any other member of the court which in the least conflict with those of Crompton, J. In *Foulger* v. *Taylor* (2), the facts were identical with those in the case referred to; the goods seized were those of a third person, and the bailiff was a trespasser, and the Court of Exchequer held that the landlord was not entitled to arrears of rent under s. 75 of the Act of 1856. But reliance has been placed upon the following expression used in the judgment of the Court: "The whole frame of the section seems directed to the case where the goods levied are the property of the tenant"; and it is argued, that as in the present case the goods seized were not the property of the tenant, the section has no application in favour of the landlord. But it must be remembered that in that case the tenant and the execution debtor were the same person, which in the present case they are not; and to make the judgment in *Foulger* v. *Taylor* (2) absolutely right, we have only to read "execution debtor" for "tenant"—an alteration which I have no hesitation in making, inasmuch as it is perfectly clear that the Court did not mean to express any dissent from the decision in *Beard* v. *Knight*. (1)

*Appeal allowed; leave to appeal granted.*

Solicitors for claimants: *Busk & Co., for Podmore, Stafford.*

Solicitors for execution creditor: *Pattison, Wigg & Co., for Goate, Coventry.*

(1) 8 E. & B. 865; 27 L. J. (Q.B.) 359. (2) 5 H. & N. 202; 29 L. J (Ex.) 154.

W. J. B.

1890
*April* 21, 22.

[IN THE COURT OF APPEAL.]

VADALA *v.* LAWES.

*Foreign Judgment—Action to enforce—Defence alleging Fraud—Re-trial of the Case on its Merits.*

Where an action is brought in England to enforce a foreign judgment, the defendant may raise the defence that the judgment was obtained by the fraud of the plaintiff even though the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign Court.

*Abouloff* v. *Oppenheimer* (10 Q. B. D. 295) discussed and followed.

THE action in the present case was brought on a foreign judgment given for the plaintiff Giuseppe Vadala, in the Court of Palermo, for 101,343 lire and interest, in respect of certain bills of exchange.

The plaintiff was a stock and share broker at Messina, in Sicily. The defendant, Sir Bennett Lawes, carrying on business as a chemical manure manufacturer, appointed one Luigi Reynolds, by power of attorney, as his representative in Sicily. In 1881 Reynolds accepted on behalf of the defendant seventeen bills of exchange drawn by the plaintiff, amounting in the whole to 101,343 lire. In November, 1881, Reynolds absconded, and the defendant was applied to by the plaintiff for payment of 95,000 lire. The defendant denied his liability, and demanded particulars, which however were not sent.

The plaintiff then brought an action against the defendant on the bills of exchange in the Royal Tribunal of Commerce of Messina, and obtained judgment against the defendant for 101,343 lire, on October 3, 1882. This judgment was affirmed by the Court of Appeal at Palermo on July 6, 1885.

On October 12, 1885, the plaintiff commenced the present action against the defendant for the sum awarded by the judgment of the Italian Courts, with interest.

The defendant put in a statement of defence, in which he raised the defence that the judgment of the Italian Courts had been obtained by fraud.

The 4th paragraph of the statement of defence, as amended, was as follows: "The defendant never had any transactions with

the plaintiff; but the said L. Reynolds had certain speculative and gambling transactions with the plaintiff, who sought to recover from him certain sums of money in respect of such speculative and gambling transactions, and subsequently the plaintiff made a claim against the defendant for moneys alleged to be due from the defendant to the plaintiff, but refused, although requested so to do, to give any particulars as to how the same was made up, or for what debt the same was alleged to be due. The plaintiff then, for the purpose of making out that the defendant was liable to the plaintiff, concocted certain bills of exchange purporting to be accepted by the said L. Reynolds, but which were not in fact accepted by him, and commenced proceedings in the Italian Courts upon the bills of exchange hereinbefore mentioned."

5. "Subsequently, for the purpose of defrauding the said Courts, the plaintiff and the said L. Reynolds fraudulently prepared other bills of exchange which the said L. Reynolds accepted. The said L. Reynolds had no authority to accept any bills of exchange by or on behalf of the defendant, as the plaintiff well knew."

7. "The plaintiff, by fraudulently concealing from the Italian Courts the true transactions between the plaintiff and the said L. Reynolds hereinbefore mentioned, and by inducing the Courts to believe that the bills of exchange, fraudulently prepared, as in paragraph 5 hereinbefore mentioned, were accepted by the said L. Reynolds as the result of commercial transactions entered into by the said L. Reynolds on behalf of the defendant, obtained each of the said judgments in the statement of claim mentioned (if any such judgments or judgment were or was obtained, which is not admitted)."

Particulars of the fraud charged having been applied for by the plaintiff, the defendant filed particulars in which he alleged as follows:—

1. "The plaintiff, prior to November, 1881, entered into speculative transactions in stocks and shares with the said L. Reynolds on the bourses of Naples and Paris, and also entered into gambling and speculative transactions in goods and produce of various kinds at Messina and Palermo."

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2. "The said L. Reynolds lost in such transactions a sum amounting to 295,000 lire, and the plaintiff from time to time applied to the said L. Reynolds to repay him such sum, and the said L. Reynolds did in fact, prior to the month of November, 1881, repay to the plaintiff a part of such sum; but a sum of not less than 95,000 lire remained due to the plaintiff."

5. "The seventeen bills of exchange on which the actions in the Italian Courts were brought were deposited in Court, and it was found that the signature of L. Reynolds to the same was a forgery; thereupon the plaintiff obtained possession of the bills of exchange by some means at present unknown to the defendant. Having obtained possession thereof, the plaintiff procured L. Reynolds to sign other bills of exchange in substitution for the original bills of exchange, and the plaintiff then deposited in Court the bills of exchange with the real signature of L. Reynolds thereon. This was done for the purpose of inducing the Court to believe that the bills of exchange on which the action was brought were given bonâ fide by the said L. Reynolds."

The defendant subsequently filed further particulars of the alleged fraud, in which he said as follows: "The bills of exchange in the defence mentioned were given for the purpose of enabling L. Reynolds to repay to the plaintiff moneys lost by him in speculative and gambling transactions to the plaintiff. L. Reynolds, being impecunious and unable to meet his liabilities in respect thereof to the plaintiff, gave the said bills or acceptances, which were discounted by the plaintiff, who kept the proceeds of the said bills, and appropriated the same to payment of the debt due to him from L. Reynolds. The plaintiff concealed from the said Courts the facts above mentioned, and induced the Courts to believe that the bills were discounted in the ordinary course of business with the authority of the defendant."

In his reply, the plaintiff pleaded that the allegations as to the speculative and gambling transactions were made by the defendant in the action in the Italian Courts, and were there gone into and adjudged against the defendant.

The action was tried before Charles, J., on November 20, 1889. At the trial the plaintiff was called, and gave evidence; but the judge stopped the counsel for the defendant when cross-

examining him as to his accounts with a view of shewing that the transactions were gambling transactions and not genuine mercantile dealings, his lordship being of opinion that the only defence of fraud raised by the defendant was that the foreign judgment had been obtained by substituting bills signed by Reynolds for forged bills. A verdict was accordingly given for the plaintiff for the amount claimed.

On February 5, 1890, the defendant moved for a new trial before a Divisional Court, consisting of Denman and Wills, JJ., who held that the second ground of defence, namely, that the Italian Courts had been misled by the fraud of the plaintiff, and induced to believe that the bills were given for genuine mercantile dealings and not for gambling transactions, was open to the defendant on the pleadings, and granted a new trial. From this order the plaintiff appealed.

*Finlay, Q.C., A. T. Lawrence,* and *Leslie,* for the plaintiff. The learned judge at the trial was right in holding that the ground of defence—that the plaintiff had deceived the Italian Courts by representing that the bills were given for genuine mercantile dealings—was not sufficiently raised by the pleadings; but if that defence was sufficiently raised, it is not a good defence to the present action. Fraud can only be set up as a defence to an action to enforce a foreign judgment where the fraud charged is as to a matter extraneous to the questions decided in the foreign Court. The first ground of defence raised by the plaintiff—namely, that bills signed by Reynolds had been substituted for the original bills—would have been a good defence if it had been proved, for that would be a fraud on the Court extraneous to the issues in the action; but that point has been decided against the defendant in the present action. His present ground of defence—that the bills were in fact given for gambling transactions—was the main issue before the Italian Courts, and was fully gone into there. The defendant cannot now have the same issue tried again in this action. There would be no finality in judgments, if one of the parties could afterwards have the case re-tried upon the allegation that the unsuccessful party knew that the case which he put before the Court, and on which the judgment was

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obtained, was a false one: *Bank of Australasia* v. *Niass* (1); *Flower* v. *Lloyd* (2); *De Medina* v. *Grove* (3); *Duchess of Kingston's Case* (4); *Henderson* v. *Henderson* (5); *Ochsenbein* v. *Papelier* (6); *Shedden* v. *Patrick* (7); *Prudham* v. *Phillips* (8); *Crawley* v. *Isaacs* (9); *Philipson* v. *Egremont.* (10) The decision in *Abouloff* v. *Oppenheimer* (11) must be read with reference to the special circumstances of the case, and could not have been intended to overrule the long current of previous authorities. To say that the English Court is not re-trying the questions decided by the foreign Court, if all the facts were before the foreign Court, merely because the question of fraud was not submitted to it, would be to fritter away the rule that the merits cannot be re-tried by the English Court.

*Sir R E. Webster, A.G.*, and *English Harrison*, for the defendant, were not called on.

LINDLEY, L.J. This is an action brought by the plaintiff upon a judgment obtained in the Italian Courts. The Italian action was brought upon certain bills of exchange, and the defence raised in the Italian action was, in substance, that those bills of exchange, which purported to be ordinary commercial bills, were given in respect of gambling transactions by an agent of the defendant, without his authority, and that the defendant was not liable upon them. That defence was tried on its merits; that is to say, the questions whether those bills were given for gambling speculations, and whether, if they were, the defendant was affected by notice of it—all that was fully gone into and decided, and it was decided in favour of the plaintiff. Judgment was accordingly given for the plaintiff for the amount of those bills; and it is upon that judgment that this action is brought.

The real nature of the defence to this action on that judgment is one of the matters in controversy now. It is alleged on the one side that the only defence raised is, that the judgment of the

(1) 16 Q. B. 717.
(2) 10 Ch. D. 327.
(3) 10 Q. B. 152.
(4) 2 Sm. L. C., 9th ed., 760.
(5) 6 Q. B. 288.
(6) Law Rep. 8 Ch. 695.
(7) 1 Macq. 535.
(8) Amb. 763.
(9) 16 L. T. (N.S.) 529.
(10) 6 Q. B. 587.
(11) 10 Q. B D. 295.

Italian Court was obtained by fraud; that is to say, that there was a shuffling of bills (I will not go through it all in detail) in the Italian Courts, a substitution of some genuine ones for some forged ones, and that by that shuffle and fraud the Italian Courts were imposed upon. That head of defence is obviously open to the defendant, and has been tried by Charles, J., and found in favour of the plaintiff—that is to say, the judge has decided that the evidence in support of that defence is insufficient to support it. Then it is alleged by the defendant (and this is what gave rise to the controversy), that he has also raised another ground of defence to this action, viz. that the plaintiff in Italy fraudulently represented these bills as commercial bills when he knew they were not, and he thereby imposed on the Courts and obtained his judgment.

Now the first question is whether that defence is really raised. Charles, J., thought it was not. He thought the only defence which was really raised was that to which I have already alluded, and which was tried. The Divisional Court, on looking further into the pleadings and looking at the particulars, have come to the conclusion that the defence may be construed, and ought to be construed, as raising that second head of defence; and upon looking at the amended statement of defence, and especially the 7th paragraph, it appears to me that the defence is capable at all events of being fairly construed in the wider sense contended for by the defendant. I do not think it is very clear; but certainly there is no surprise, because if there is any ambiguity at all on the defence, that ambiguity is removed by the particulars, which make it clear enough. I quite accede to the argument for the plaintiff, that the particulars are particulars of the defence; but if there is some little obscurity in the pleading, and that obscurity is more than removed by the particulars, I am not disposed to construe the pleadings so narrowly as the plaintiff has asked us to construe them. Therefore the conclusion I have come to is this: that what I will call the second head of defence, namely, that the plaintiff imposed upon the Italian Courts by fraudulently representing to the Courts that these bills were good commercial bills, and not bills for gambling transactions, is sufficiently raised to enable the defendant to go into it if in point of law he is entitled

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to do so. That gets rid of the question simply on the particulars, which is after all a comparatively small point; because if he is entitled to raise this defence, and he had asked it, the Divisional Court would have given leave to amend—and probably so should we if we had been asked.

But we now come to another and a more difficult question, and that is, whether this defence can be gone into at all. There are two rules relating to these matters which have to be borne in mind, and the joint operation of which gives rise to the difficulty. First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter: using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits.

Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff* v. *Oppenheimer*. (1) At the time when that case was decided, namely, in 1882, there was a long line of authorities including *Bank of Australasia* v. *Niass* (2), *Ochsenbein* v. *Papelier* (3), and *Cammell* v. *Sewell* (4), all recognising and enforcing the general proposition, that in an action on a foreign judgment you cannot re-try the merits. But until *Abouloff's Case* (1) the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without reopening the merits, had never come forward for explicit decision. That point was raised directly in the case of *Abouloff* v. *Oppenheimer* (1), and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign

(1) 10 Q. B. D. 295.
(2) 16 Q. B. 717.
(3) Law Rep, 8 Ch. 695.
(4) 5 H. & N. 728.

Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this Court you have to consider whether the foreign Court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much importance to it; but in that case the Court faced the difficulty that you could not give effect to the defence without re-trying the merits. The fraud practised on the Court, or alleged to have been practised on the Court, was the misleading of the Court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the Court below was or was not false, was the very question of fact that had been adjudicated on in the foreign Court; and, notwithstanding that was so, when the Court came to consider how the two rules, to which I have alluded, could be worked together, they said: "Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to re-try the merits, you are entitled to do so according to the law of this country." I cannot read that case in any other way. Lord Coleridge uses language which I do not think is capable of being misunderstood. In order to understand the judgment, it is well to look at the argument for the defence—an argument conducted by Mr. Benjamin and Mr. Cohen, and an argument which I understand to have been accepted by the Court: "Even if the Russian Courts had inquired into the existence of the fraud, and had been induced by fabricated evidence to come to a wrong conclusion, the circumstances under which the judgments were given could be investigated in an English Court." Then Lord Coleridge says (at p. 302): "An ingenious attempt has been made to take this case out of the general proposition" (namely, that you can impugn a foreign judgment for fraud), "and to call in aid another equally clear proposition, namely that the Courts of this country, in dealing with a foreign judg-

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ment, will not inquire whether the foreign Court pronounced a judgment correct in point of law, or right and accurate in point of fact, and that inasmuch as the defence now relied upon might have been, and perhaps was, brought before the foreign Court which decided against the allegation of fraud, the foreign Court, in the words of De Grey, C.J., was mistaken, and not misled. The answer to that contention has been given in the course of the argument for the defendants. We are to decide whether the Courts at Tiflis have been misled by the fraud of the plaintiff; but the question whether they were misled never could have been submitted to them, never could have been in issue before them, and, therefore, never could have been decided by them. The English Courts are not either re-trying or even re-discussing any question which was, or could have been, submitted to the determination of the Russian Courts." The counsel for the plaintiff have pointed out, and I think unanswerably, that that is really frittering away, if you look at it from one point of view, the general rule on which they are relying, that you cannot re-try the merits. To a technical objection it is a good technical answer to say: "The substance is the same—that you do re-try the merits (as I understand the judgment to mean) for the purpose of satisfying an English jury that the foreign Court has been imposed upon; and if you cannot prove that the imposition was made without re-trying the merits, you are at liberty to re-try them." I understand the decision to go that length. Baggallay, L.J. (at p. 303), expresses the same idea. He says: "If the judgments had not been improperly obtained, the right of the plaintiff would be clear. In using the words, 'improperly obtained,' I desire to be understood as not limiting them to a case where a fraud has been perpetuated upon the foreign Court itself. I apply them also to a case where a fraud has been perpetrated and the foreign Court was not ignorant of the facts on which the assertion of fraud was based." That is to say, not only where there has been a fraud on the Court by what is called extrinsic circumstances, such as the alleged shuffling of the bills of exchange, but where the plaintiff has obtained judgment by the use of perjured evidence, that is such a fraud as would enable the defendant to impeach the foreign judgment. The present

Master of the Rolls says (at p. 306): "It is a very small matter to be considered whether these facts ought to have been alleged in the defence by the defendants, or whether they ought to have been asserted in the reply by the plaintiff, and the question has been fully argued before us whether, if the plaintiff's fraud was asserted by the defendants at the trial in the Russian Courts, and if evidence in proof of it was given by them, they are now debarred from relying on the plaintiff's fraud as a defence to the present action. I will assume that in the suit in the Russian Courts the plaintiff's fraud was alleged by the defendants, and that they gave evidence in support of the charge. I will assume even that the defendants gave the very same evidence that they propose to adduce in this action; nevertheless, the defendants will not be debarred at the trial of this action from making the same charge of fraud, and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and that the fraud was committed, the defendants will be entitled to succeed in the present action." Then further on he says: "I accept the whole doctrine, without any limitation, that whenever a foreign judgment has been obtained by the fraud of the party relying upon it, it cannot be maintained in the Courts of this country; and, further, that nothing ought to persuade an English Court to enforce a judgment against one party which has been obtained by the fraud of the other party to the suit in the foreign Court." That last passage can only be applicable to cases where there is what is called extraneous fraud, such as imposition on the Court itself; but when I come to look at the defendants' argument, and the whole judgment, I cannot conceal from myself that it has been decided to the effect I have already mentioned; and that, therefore, it is competent in point of law for the defendant in this action to raise this defence, and to satisfy the jury, if he can, that the Italian Court was misled by the fraud of the plaintiff, that fraud consisting in this—that the plaintiff knowingly placed before the Italian Court bills of exchange which he alleged to be commercial bills, when in truth and in fact he knew them to be nothing of the sort, but bills for gambling transactions. And if the jury were to find in fact, not only that the bills were for

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gambling transactions, but, further, that the Italian Court has been imposed on by the fraud, that is a good defence according to the case of *Abouloff* v. *Oppenheimer*. (1)

It appears to me, therefore, impossible, in the face of that case, to differ from the view taken by the Divisional Court; and consequently this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion.

*Appeal dismissed.*

Solicitors for the appellant: *Harries, Wilkinson, & Raikes.*
Solicitors for the respondent: *Markby, Stewart & Co.*

M. W.

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June 14, 17, 28.

## BUDGETT & CO. *v.* BINNINGTON & CO.

*Ship—Bill of Lading—Charterparty—Demurrage—Fixed number of Lay-days—Liability of Consignee for Delay occasioned by a Strike, rendering it impossible for the Shipowner to perform the Ship's part of the Unloading.*

A cargo was shipped under a bill of lading incorporating a clause in a charterparty which fixed the number of lay-days for unloading and allowed other days for demurrage. Neither the bill of lading nor the charterparty contained any exception of strikes. By the custom of the port of discharge cargoes were unloaded by the joint act of the shipowner and the consignees. During the lay-days a strike took place, both among the labourers employed on behalf of the ship and those employed by the consignees, with the result that the unloading ceased, and could not be resumed till some days after the expiration of the lay-days:—

*Held*, that as the number of lay-days allowed for the discharge was fixed, the consignees were liable to pay demurrage, notwithstanding the inability of the shipowners owing to the strike to do their part in the unloading.

*Thiis* v. *Byers* (1 Q. B. D. 244) considered.

MOTION for judgment in an action tried at Bristol before Cave, J., and a jury, in which the plaintiffs, who were indorsees of the bill of lading for a cargo of barley shipped on board the defendants' steamship *Fairfield*, sought to recover a sum of 147*l.* 15*s.* 11*d.*, paid by them under protest in respect of a claim of the defendants for keeping the vessel on demurrage at Bristol.

By the bill of lading the cargo was described as shipped at Feisk for delivery at a port as ordered to the shippers or to their

(1) 10 Q. B. D. 295.

assigns "they paying freight and demurrage if any" "all conditions as per charterparty." By the charterparty, the cargo was "to be brought and taken from alongside the steamer at freighters' expense and risk," but the crew were "to render all customary assistance in hauling lighters alongside," and "thirteen running days, Sundays excepted," were "to be allowed the freighters (if the steamer be not sooner despatched) for sending the cargo alongside and unloading; but in no case should more than seven running days, Sundays excepted, be allowed for unloading, and ten days on demurrage over and above the said lay-days, at 4*d.* per ton on the steamer's gross register tonnage per running day;" and "the freighters' liability" was "to cease when the cargo was shipped, the owner or his agent having an absolute lien on the cargo for freight, dead freight, demurrage, lighterage at port of discharge, and average." The lay-days having been consumed at the port of loading, the defendants had agreed by letter with the shippers to allow six additional running days, Sundays excepted, for the discharge of the cargo. The bill of lading contained the usual exceptions; but neither the bill of lading nor the charterparty contained any reference to strikes.

The *Fairfield* received orders for and arrived at Portishead Dock, Bristol. Her lay-days commenced on Monday, 25th, and ended on Saturday, November 30, 1889. It appeared that at Bristol grain cargoes in bulk from Black Sea ports are ordinarily discharged by the joint action of the consignees and the shipowners. In the present case the plaintiffs' part of the discharge was performed by the Bristol Docks Committee, who employed a firm of master stevedores; that of the defendants, by another firm of master stevedores; the number of dock labourers employed on behalf of the consignees being, as is usual, larger than that of those employed on behalf of the shipowners. The operation commences by "bushellers," employed by the consignees, going into the holds and putting the grain into sacks. They attach the sacks to a running noose, and the sacks are then hoisted by winches driven by "winchmen," employed by the shipowners, on to the deck. On the deck they are put into the scales by "bearers in," employed by the shipowners. They are there weighed by "weighers," employed by the consignees, and are carried into

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craft, trucks, or warehouse, as required, by "landers," employed by the consignees. "Talleymen" are employed by both shipowners and consignees, and the shipowners employ a "foreman." During the first three lay-days, Monday, 25th, Tuesday, 26th, and Wednesday, 27th November, more than half the cargo was discharged. On Thursday, November 28, the dock labourers employed by both firms of stevedores struck, and during that day, Friday, and Saturday, November 29, 30, Monday, 2nd, and Tuesday, 3rd December, no cargo was discharged. On Wednesday, December 4, the strike ended, and the discharge was recommenced, and, the gangs working day and night, was completed early on Thursday, December 5. Under these circumstances the defendants claimed demurrage in respect of the days occupied in loading subsequent to November 30, and exercised their lien on the cargo in respect of the sum claimed in the action.

For the defendants, it was contended that, under the contract, the obligation of the plaintiffs to pay the demurrage claimed was absolute; and also that, as a matter of fact, the dock labourers employed on behalf of the ship were willing to work during a part of Thursday, November 28; while as regards Friday and Saturday, November 29 and 30, those of the officers and crew who remained on board, not having been discharged on the arrival of the steamer at Portishead, and the master stevedores employed on behalf of the defendants, were ready to do the part of the discharge customarily performed by the ship. It was not disputed that the strike rendered it impossible for the master stevedores employed by the Bristol Docks Committee to find dock labourers ready to work.

By consent, the following question was left by the judge to the jury: "Were the shipowners ready and willing to do their part of that which it was customary for them to do?" In answer to a juror, the learned judge said that, if the shipowners were not able to do their part, they could not be said to be ready and willing to do it. The jury found that the defendants were not ready and willing to perform their part of the discharge. The learned judge left the parties to move for judgment.

*Bucknill, Q.C.*, and *J. V. Austin*, for the defendants. The

defendants are entitled to judgment, *Thiis* v. *Byers* (1) is an express authority in their favour. In that case the same question arose upon a similar clause in a charterparty, and it was held that, as the clause prescribed a time for unloading, there was an absolute contract on the part of the charterer to unload within the prescribed time, notwithstanding that during part of it he was prevented from doing his share of the work, because the weather made it impossible for the master to do the ship's share. Here, as strikes are not excepted in either the bill of lading or the charterparty, the position of the consignees and the shipowners as regards demurrage is the same as that of the charterer and the shipowner in *Thiis* v. *Byers*. (1) The rule is similarly stated in *Randall* v. *Lynch* (2); *Leer* v. *Yates* (3); *Harper* v. *McCarthy* (4), and *Brown* v. *Johnson* (5), cases cited in the judgment in *Thiis* v. *Byers* (1), in the judgment of Brett, L.J., in *Porteus* v. *Watney* (6), and in the extract from the 5th edition of Abbott on Shipping, p. 180, which is cited by Lord Blackburn in *Posthlethwaite* v. *Freeland*. (7) Carver on the Law of Carriage at Sea, ss. 608, 611, is to the same effect.

*Cohen, Q.C.*, and *Pyke*, (*E. U. Bullen*, with them), for the plaintiffs. The plaintiffs are entitled to judgment. There is no case which decides that demurrage can be recovered where the detention of the ship is due in part to the default of the shipowner. Here the defendants were in default, as, owing to the strike, they had not dock labourers to do the ship's part of the work of unloading. In *Thiis* v. *Byers* (1), the shipowner was not in default. There it was the duty of the master and crew to get the cargo of timber out of the hold and to form it into rafts for the consignees to take away with tugs. Bad weather came on, and made the performance of this duty for a time impossible; but the master and crew were during all this time at their posts ready to perform it. The decisions on the subject all presuppose readiness and willingness on the part of the shipowner to do his share of the work, and this is true of the passages which have been cited from text-books.

(1) 1 Q. B. D. 244.
(2) 2 Camp. 352.
(3) 3 Taunt. 387.
(4) 2 B. & P. (N R.) 258.
(5) 10 M. & W. 331.
(6) 3 Q. B. D. 543.
(7) 5 App. Cas. at p. 618.

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The principle which should govern the case is that alluded to by Lord Blackburn in *Mackay* v. *Dick* (1): "Where in a written contract it appears that both parties have agreed that something shall be done which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing." His lordship cites as an authority a case from the Year-book of 9 Edward IV. It follows that a shipowner cannot recover damages from the other party to a contract of affreightment for non-performance of that part of it which relates to discharging the cargo, if the failure to discharge has been caused wholly or partly by his own default. Here it was the absolute duty of the defendants as shipowners to have sufficient dock labourers and mechanical appliances to do the ship's part of the work. The circumstance of the number of lay-days being fixed could not affect this absolute duty. That circumstance no doubt imported an undertaking on the part of the plaintiffs that the steamer should be discharged within the stipulated time, and subjected them to liability for delay arising from occurrences beyond their own personal control; but it could not render them liable for delay arising from the refusal of the dock labourers employed by the defendants to do their duty. Had the winches broken down or had the ship sunk, it could not have been contended that the lay-days continued to run against the plaintiffs during the time occupied in repairing the winches or raising the ship.

[They also cited *Barret* v. *Dutton* (2); *Straker* v. *Kidd* (3); *Benson* v. *Blunt* (4); *Appleby* v. *Myers* (5); *Ford* v. *Cotesworth* (6); *Nelson* v. *Dahl* (7); *Grant* v. *Coverdale* (8); *Morton* v. *Lamb* (9); *Bankart* v. *Bowers* (10); *Pordage* v. *Cole* (11); Leake on Contracts, p. 647.]

*Bucknill, Q.C.*, in reply.

*Cur. adv. vult.*

(1) 6 App. Cas. 251, at p. 263.
(2) 4 Camp. 333.
(3) 3 Q. B. D. 223.
(4) 1 Q. B. 870.
(5) Law Rep. 2 C. P. 651.
(6) Law Rep. 4 Q. B. 127; 5 Q. B. 544.
(7) 12 Ch. D. 568.
(8) 9 App. Cas. 470.
(9) 7 T. R. 125.
(10) Law Rep. 1 C. P. 484.
(11) 1 Wms. Saund. 319, 320.

June 28. The judgment of the Court (Denman, Charles, and Vaughan Williams, JJ.) was read by

VAUGHAN WILLIAMS, J. The question in this case is whether under the circumstances of it the shipowners are entitled to charge demurrage. The shipowners refused to give up the goods of the consignees unless the demurrage claimed was paid, and the consignees, having paid under protest, seek to recover what they paid in this action.

The facts of the case are these. The plaintiffs are indorsees of a bill of lading in respect of the cargo of the steamer *Fairfield*. Such bill of lading incorporates the terms of a charterparty whereunder the plaintiffs were allowed thirteen running days, Sundays excepted, for sending the cargo alongside and unloading, but in no case should more than seven running days, Sundays excepted, be allowed for unloading; demurrage over and above the said lay-days at 4*d.* per ton on the steamer's gross register tonnage per running day. By the charterparty the master undertook to deliver the cargo from alongside. By the custom of the port of Bristol the unloading of cargo is the joint act of the ship and the consignee. In the case of a grain cargo the first act done is that the consignee sends on board men with shovels and bushels and sacks. Then the master nominally (but the stevedores in fact, as his agents) raises the sacks from the hold and brings them to the bulwarks ready to deliver overside to the consignee or his agents, viz., in the port of Bristol, the stevedores employed by the Dock Company. The ship in question arrived on November 23, and the unloading was begun on Monday, the 25th; but in the midst of the unloading, on the 28th, the dockers and stevedores struck, as well those employed by the dock company as those employed by the ship, and the result of this was that neither was the master in a position that he could deliver, nor the consignees that they could receive, or otherwise do their part in the unloading. The jury were, by agreement of the parties, asked the following question, viz., "Was the shipowner ready and willing to do his part of that which it was customary for him to do?" The answer of the jury was "No." The learned judge, in the course of his summing-up, in answer to a juror, said, that if the master was not able to do his part he

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was not ready and willing. The question is, for whom judgment ought to be entered under such circumstances.

It is said by the plaintiffs that readiness and willingness of the master to deliver the cargo to the consignees is a condition precedent, the non-existence of which, according to the finding of the jury, disentitles the master from claiming this demurrage; and it is further said, that even though readiness and willingness to deliver the cargo may not be a condition precedent, it is something which the master has to do on his part concurrently with the part which the consignee has to take in the loading of the ship, and that, therefore, on the well-known principle established by the cases cited in the notes to *Peters* v. *Opie* (1), *Armitage* v. *Insole* (2), and many other cases, the master cannot demand performance by the consignee of his part without averring readiness and willingness, if not a tender of performance of the conditions concurrent due from him, which, for the purpose of effectively making his demand on the consignee, become conditions precedent. While approving of those contentions so far as relates to conditions precedent, we are of opinion that they are not applicable to the present case, and, therefore, afford no ground for holding that the master was not entitled to claim demurrage. The fact is, that the obligation of the consignees to pay demurrage is "absolute," as was decided in *Thiis* v. *Byers*. (3) The readiness and willingness of the master to make delivery is not the consideration of or condition precedent to the undertaking to pay demurrage for the detention of the ship; and this being so, it is not sufficient to relieve the consignee of the obligation to pay demurrage that he should shew that the master was unable to perform some obligations undertaken by him in the charter-party, but it must appear that the consignee was prevented from discharging the ship within the time allowed for unloading by the act of the master or those for whom he was responsible. If this were not so, the master would not have been entitled to recover demurrage in the cases of *Thiis* v. *Byers* (3), *Porteus* v. *Watney* (4), *Straker* v. *Kidd* (5); for in each of these cases it

(1) 2 Wms. Saund. 346.
(2) 14 Q. B. 728.
(3) 1 Q. B. D. 244.
(4) 3 Q. B. D. 227.
(5) 3 Q. B. D. 223.

is plain from the facts that the master was not ready and willing to make delivery, because he was prevented in the one case by the weather, and in the other two cases by the non-removal by third persons of the superincumbent cargo. It is quite true that in *Straker* v. *Kidd* (1), Lush, J., speaks of "an implied condition that the shipowner shall be ready and willing to deliver"; but his meaning is made plain by the next sentence in his judgment, where he says, "If he (the master) wrongfully refuses to give over his goods, or if by reason of any default of his, or of any obstacle for which he is responsible, the consignee is unable to get his goods, this would afford a good answer to the claim"; and, again, after stating that the contract is absolute and not conditional, the learned judge says: "The defendants are, therefore, liable unless they can shew that some act or default of the owner, or of some one for whom he is responsible, prevented them from performing their contract."

In the present case the plaintiffs were not prevented from performing their contract by any default of the shipowner, or those for whom he was responsible. It was the action of the stevedores and dockers which alike prevented the plaintiffs and defendants from doing their part in the unloading. This in no way relieves the charterer or consignee from the *absolute* contract to pay demurrage for delay and detention of the ship during unloading. If the strike of the stevedores had resulted from unreasonable conduct of the master in refusing reasonable wages asked by the stevedores, the case might have been different; for then, perhaps, it might have been said that the shipowner prevented the charterer performing the contract, and that the act of the shipowner was the causa causans preventing the charterer; but even in such a case the charterer would, in our opinion, have to shew that he was actually prevented by the default of the shipowner, i.e., that there were no available means of performing the contract, notwithstanding the default of the shipowner: see *Alston* v. *Herring*. (2) If such means were available the charterer must avail himself of them to discharge the ship, and take his remedy by suing the shipowner for breach of contract, or he will be liable to demurrage.

(1) At p. 226. (2) 11 Exch. 822.

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The result in the present case is that judgment must be entered for the defendants, with costs of action and of this motion.

Solicitors for plaintiffs: *Whites & Co., for Henry Brittan & Co., Bristol.*

Solicitors for defendants: *W. A. Crump & Sons.*

H. D. W.

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*June 7.*

## COLTMAN *v.* CHAMBERLAIN.

*Ship—Mortgage—Articles passing to Mortgagee as part of Ship—Merchant Shipping Act,* 1854 (17 & 18 *Vict. c.* 104), *ss.* 66, 70, 469, 484.

A mortgage of a ship passes to the mortgagee under the word "ship" articles necessary to the navigation of the ship or to the prosecution of the adventure which were on board at the date of the mortgage and articles brought on board in substitution for them subsequently to the mortgage.

APPEAL from the decision of a master in a summary manner upon interpleader proceedings, referred by the judge at chambers to the Court.

On October 30, 1888, the defendant executed a mortgage to Woodger, the claimant, of a fishing vessel called the *Freedom.* The mortgage was in the form now in use in substitution for Form I. in the Appendix to the Merchant Shipping Act, 1854; by it the mortgagor purported to mortgage sixty-four sixty-fourth shares "in the ship above particularly described, and in her boats, guns, ammunitions, small-arms, and appurtenances." Subsequently the plaintiff recovered a judgment, and issued execution against the mortgagor, under which execution divers articles on board the *Freedom* were seized by the sheriff; and these articles having been claimed by the mortgagee, the sheriff interpleaded.

The goods seized comprised two classes of articles—those on board the vessel at the date of the mortgage, and those subsequently brought on board. The former class consisted of several sails, two compasses (one fitted and one spare), two side lights, two masthead lights, and a small steam-engine used for moving the fishing gear; some of the articles were stowed away and not in actual use. The latter class comprised four sails,

trawl beam and head, wire trawl warp, rope, twine, a boat, clock, lamp, lantern halyards, a chart, a flare fire, a barometer, tea-kettles, saucepan, baking-tins, plates, and sundries. Upon the affidavits used there was a conflict as to whether the articles brought on board after the date of the mortgage were in substitution for articles originally on board, or whether they were merely additions to them; but the Court held, as will be seen, that the true conclusion of fact to be drawn from the affidavits was that those articles were brought on board in substitution for similar articles which were on board at the date of the mortgage.

The master held that all the articles passed to the claimant under his mortgage, and the execution creditor appealed.

*Montague Lush* and *Ronald McNeill*, for the execution creditor. The mortgage of a ship does not include her fittings, unless they are expressly mentioned; this is apparent from a comparison of the language of different sections of the Merchant Shipping Act, 1854. In ss. 66 and 70, which are those dealing with mortgages, the word "ship" only is used, while in ss. 469 and 484, dealing with wreck and salvage, the expressions respectively used are "ship, boat, cargo, apparel, or wreck," and "ship, stores, tackle, or furniture." The inference is that in the Act the word "ship" means what it is ordinarily understood to mean, and that fittings, tackle, apparel, &c., do not pass under the word "ship," but must be expressly referred to in the mortgage. As to the articles on board at the date of the mortgage, they were not part of the ship, and come within the principle of *In re Salmon & Woods, Ex parte Gould* (1), where it was held that fishing-nets did not pass under a mortgage of the ship and her appurtenances. Similarly, in *Lano* v. *Neale* (2), Lord Ellenborough held that iron ballast could not be considered as part of the ship. The effect of the cases is that where a thing on board a ship is severable, although it may be appurtenant to the ship, it is not part of it, and that under the word "ship" only those things pass which are actually attached to the ship, and which may be said to be of the nature of fixtures. As

(1) 2 Mor. Bkcy. Cas. 137. (2) 2 Stark. 105.

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to the sails and other articles brought on board after the date of the mortgage, it is clear that there was no title at law to them by virtue of an assignment of after-acquired property; neither was there a valid assignment in equity, for there are no words in the mortgage amounting to a good equitable assignment, and words to that effect are essential: *Langton* v. *Horton.* (1)

If the mortgage was a mortgage of anything more than the ship itself, and impliedly gave a power to seize moveable chattels on board, it required registration as a bill of sale, and was not within the exception contained in s. 4 of the Bills of Sale Act, 1878, in favour of "transfers or assignments of any ship or vessel or any share thereof."

*J. P. Aspinall,* for the claimant. Everything which was on board at the date of the mortgage, and which was necessary to the prosecution of the voyage, necessarily passed under the mortgage as part of the ship; on that point the judgments of Cave and Wills, JJ., in *In re Salmon & Woods, Ex parte Gould* (2), are in favour of the claimant's contention; that case was decided adversely to the mortgagee on the sole ground that there was nothing to shew that the fishing-nets there claimed were appropriated to any particular boat; where, however, there is such specific appropriation, such articles would pass as part of the ship: *Woods* v. *Russell* (3), where a rudder and cordage, which had been obtained by a shipbuilder for a particular ship which he was building under a contract, were held to pass to the shipowner as part of the ship. In *Gale* v. *Laurie* (4) the effect of the decision was practically that the word "ship" meant the same as "ship and her appurtenances"; that case was decided on a statute in pari materiâ, and amounts to a decision that "ship," as used in the Merchant Shipping Act, 1854, includes everything on board which is necessary for her navigation—that is, not merely for moving her through the water, but for the purposes of the trade in which she is engaged. The application to the ship makes such articles part of the ship, and the mere fact that they are severable does not prevent their passing. If the contention

(1) 6 Jur. 910.
(2) 2 Mor. Bkcy. Cas. 137.
(3) 5 B. & Ald. 942.
(4) 5 B. & C. 156.

of the execution creditor is right, it would lead to very inconvenient results; an owner of (say) ten sixty-fourth shares in a ship would, on selling them, pass to the buyer only so many shares in the ship itself, while the ten sixty-fourth shares in the sails and cordage would remain in the seller; so that each sail in the ship might be the property of a different owner.

Secondly, the articles brought on board after the mortgage in substitution for the first class of articles passed to the mortgagee. The case is analogous to that of trade fixtures annexed to the freehold for the more convenient using of them, and not for improving the inheritance; such fixtures, if annexed during the continuance of the mortgage, pass to the mortgagee as an additional security for the debt: *Climie* v. *Wood.* (1) There would be grave inconvenience in any other state of the law; things necessarily get worn out during a voyage, and a ship must go into port to replace them; if the contention of the execution creditor is right, the mortgagee must have the ship inspected every time she comes into port and a fresh mortgage executed in respect of all substituted articles, if he is to have the same security as his original mortgage gave him.

Thirdly, there was no necessity for a registration of the mortgage under the Bills of Sale Acts. [He was stopped on this point.]

*Ronald McNeill*, in reply.

CHARLES, J. In this case there is a contest between the execution creditor of the deceased mortgagor and the mortgagee of a fishing smack called the *Freedom*; and the question we have to determine is whether certain articles mentioned in the admissions pass to the mortgagee under the mortgage. The articles were of two classes—those which were on board at the date of the mortgage, and those which were brought on board afterwards; and I will deal with them in that order. The first class, the things on board at the date of the mortgage, comprised a mizen sail, a maintop sail, a stay foresail, big foresail, and four jibs. Some of these were stowed away, and not in actual use, but they were all

(1) Law Rep. 3 Ex. 257.

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on board at the date of the mortgage; there were also two compasses, side lights, masthead lights, and a small steam-engine, not used for the purpose of propelling the boat, but for lifting the fishing gear. Did these articles pass under the mortgage; and, if so, under what denomination did they pass? The mortgage was expressed to be one of "sixty-four sixty-fourth shares, of which I [the mortgagor] am the owner in the ship above particularly described, and in her boats, guns, ammunitions, small-arms, and appurtenances"; and the ship referred to is the *Freedom*. In the earlier part of the mortgage there is a particular account of the number of her decks and masts, and of her rigging. It seems to me that the articles which were on board at the date of the mortgage passed to the mortgagee under the word "ship"—it might, indeed, be said that they came under the word "appurtenances," but the current of the authorities is in favour of their passing as part of the ship.

Upon this point two cases have been cited to us, of which the first is *Gale* v. *Laurie* (1), which turned on the meaning of s. 1 of 53 Geo. 3, c. 159, which was the statute at that time in force as to the limitation of liability of shipowners for damage caused by their vessels during their navigation; that section enacted that owners of ships were not to be liable to make good any loss or damage occasioned without their fault or privity further than "the value of his or their ship or vessel and the freight," &c. In the Admiralty Court it was sought to charge the owner of a whaler called the *Dundee* with damage occasioned by a collision, the value of the ship being taken to include her tackle, apparel, and fishing stores; the owner then applied to the Court of King's Bench for a writ of prohibition directed against the entertaining the claim so far as regarded the value of the fishing stores, which was considerable, and, the owner having been put to declare in prohibition, the prohibition was eventually refused, and the case was remitted to the Admiralty Court, the judgment of the King's Bench being to the effect that the fishing stores, being on board the ship for the object of the voyage and adventure on which she was engaged, were part of the ship. It was pointed out by Abbott, C.J., in delivering the judgment of the Court, that the

(1) 5 B. & C. 156.

word "ship" only is used in the first section of the Act of Geo. 3; but that in the following sections the phrase, "value of the ship and her appurtenances," is used not less than ten times; and he goes on to say that the first section of the Act must be understood as if the words, "with all her appurtenances," were used in it, supposing those words would make any difference in the sense. He further says that the construction which the Court placed on the section furnished a plain and intelligible general rule: whereas, if they were to hold that nothing was to be considered as part of the ship that was not necessary for her navigation or motion on the water, a door would be opened to many nice questions, and to much discussion and cavil. That decision, therefore, is to the effect that the word "ship" in s. 1 of the Act of Geo. 3, covered the fishing stores on board—that is, the articles on board which were needful for the accomplishment of the objects of the voyage; it is true that it is a decision on an Act of Parliament regulating the limitation of the shipowner's liability; but it is an instructive exposition of what is included in the word "ship."

The second case is that of *In re Salmon & Woods, Ex parte Gould.* (1) There certain fishing boats had been mortgaged, and upon the bankruptcy of the mortgagor the mortgagees laid claim to the nets and fishing gear which had been used on board the boats; there was, however, nothing to identify any particular nets as having been appropriated, or as specially belonging to any particular boat, and upon that ground alone the Court thought that the fishing gear did not come within the word "ship" in s. 72 of the Merchant Shipping Act, 1854, nor within the word "appurtenances" in the form of mortgage then used. Sect. 72 of that Act uses the word "ship" only, and Wills, J., says, in his judgment: "It has been argued that 'ship' is equivalent to 'ship and its appurtenances,' and to a certain extent that is doubtless so. It would include spare sails, duplicate anchors—anything, in fact, which it would not be prudent to send a ship to sea without." We have here a judicial interpretation of the meaning of the word "ship," as used in the Merchant Shipping Act, 1854, and, taking that definition, I am

(1) 2 Mor. Bkcy. Cas. 137.

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of opinion that those articles, which practically consisted of machinery for working the fishing gear—articles necessary for steering, lights necessary for navigation, and sails necessary for sailing—passed to the mortgagee under the mortgage of the ship. So far as those articles are concerned there is no necessity to place a meaning upon the word "appurtenances."

There are, however, other things which are in dispute in the present case; but if the construction which I have placed on the language of the mortgage be the true one, it really settles the question with regard to the second class of articles, as well as with regard to the first; for the articles comprised in the second class are articles which are in substitution for the original articles, are necessary for the navigation of the ship, and are articles without which no prudent person would sail. It is true, that as to one or two of them, there is no admission that they were brought on board in substitution for the originals; but, in my opinion, the true conclusion of fact to be drawn from the affidavits is that the articles in the second class were brought on board in substitution for the articles originally on the ship. If so, they passed under the mortgage of the ship. It is contended on behalf of the execution creditor that they did not so pass, that there are no words in the mortgage giving the mortgagee an interest in after-acquired property (which is true), and that, therefore, the equitable doctrine as to the assignment of after-acquired property has no application to the present case. But in my opinion it is unnecessary that there should have been such words—words amounting to an equitable assignment—in the mortgage; for in the case of substituted articles, what has to be looked to is whether the articles for which they were substituted were essential to the original equipment of the ship as a ship, and then, if the original article passes the substituted article passes also; this would clearly be the case with repairs effected to the hull, or with a new mast substituted for a mast damaged during a voyage; and in this respect I can draw no distinction between masts and sails.

In my judgment, there is no ground for saying that the mortgage ought to have been registered under the Bills of Sale Acts.

VAUGHAN WILLIAMS, J. I am entirely of the same opinion.

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*Judgment for the claimant.*

Solicitors for execution creditor: *Bridges, Sawtell, Heywood & Co.*

Solicitor for claimant: *W. Batham.*

W. J. B.

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ROLLES *v.* NEWELL.

*June* 10, 11.

*Ship—Sailing Rules—Thames Navigation—Tug towing Barges into Dock—"Navigating"—Watermen's and Lightermen's Amendment Act,* 1859 (22 & 23 *Vict. c. cxxxiii., ss.* 8, 100)—*Bye-law* 59.

Bye-law 59 of the bye-laws made under the Watermen's and Lightermen's Amendment Act, 1859, provides that, "if any person when in charge of and navigating any steamboat on the river" Thames, within certain prescribed limits, "shall at the same time tow more than six barges . . . exceeding ten tons each, attached thereto . . . the person in charge of or navigating the same shall incur a penalty."

The appellant, the master in charge of a steam-tug, having been charged under the above bye-law, it appeared that he had collected thirty-one barges exceeding ten tons each at a point on the river within the prescribed limits immediately adjoining the entrance to a dock, made them up into a line four abreast extending along the shore from the Dolphin at the dock entrance, and towed them all at the same time from the point where they were so lying into the dock:—

*Held*, that he was not liable, inasmuch as in so towing the barges into the dock he was not navigating his tug on the river within the meaning of the bye-law.

CASE stated by a deputy stipendiary magistrate.

The appellant, the master of a steam-tug, collected thirty-one barges, exceeding ten tons each, by towing them four or five at a time and making them fast to the dummy-barge lying alongside the Upper Dolphin of the Victoria Dock entrance. For the purpose of being taken into the said dock, the barges were then made up in line four abreast along the shore extending from the said Upper Dolphin for a distance of about 250 or 300 yards up the river. The appellant then towed the whole thirty-one barges at the same time from the place where they were so lying into the dock. The operation of so towing them was conducted under the directions of the pier-head foreman of the London and St.

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Katharine Docks Company, acting under the orders of the dock master of the company. Barges had been towed into the docks in a similar way, as many as sixty or eighty at a time, under the directions of the dock master and officials of the dock company for the last thirteen or fourteen years, and it was the regular practice so to tow them. The Victoria Docks are regulated by the London and St. Katharine Docks Act, 1864 (27 & 28 Vict. c. clxxviii.), and the Acts incorporated therewith. Among the provisions thereby incorporated is s. 46 of the Victoria (London) Docks Act, 1853 (16 & 17 Vict. c. cxxxi.), which prescribes the docks, works, and a distance of 100 yards into the river from the entrance gates of the dock as the limits within which the powers of the dock master shall be exercised; and s. 52 of the Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), which provides that the "harbour master (which term includes dock master) may give directions . . . for regulating . . . the manner in which any vessel shall enter into the dock." The Dolphin, from which the appellant commenced to tow the barges into the dock, is less than 100 yards from the said entrance gate of the Victoria Docks, and is situate between the entrance to the said dock and Vauxhall Bridge. The appellant was summoned for unlawfully towing more than six barges at the same time in breach of bye-law 59 of the bye-laws made under the Watermen's and Lightermen's Amendment Act, 1859, which provides that, "if any person when in charge of and navigating any steamboat on the river between Vauxhall Bridge and the entrance to the Victoria Docks shall at the same time tow more than six barges . . . exceeding ten tons each attached thereto . . . the person in charge of or navigating the same shall incur a penalty." The deputy stipendiary magistrate convicted the appellant, subject to a case for the opinion of the Court.

*Cohen, Q.C.* (*H. Avory*, with him), for the appellant. The tug was not being navigated on the river within the true meaning of this bye-law. It would be impossible for the tug to tow as many as thirty-one barges into the dock in separate batches of six, for before they had all got in the water would have fallen too low to allow of their getting over the sill. Consequently, if the re-

spondents' construction of the bye-law is right, the barge owner would have to employ several tugs. This would entail unnecessary and unreasonable expense, and would produce great inconvenience. Further, the bye-law does not apply to that portion of the river over which the towing took place. By s. 100 of the Watermen's and Lightermen's Amendment Act, 1859, nothing in that Act is to lessen the rights and privileges of any company of proprietors of any docks within the limits of the Act, or any of their officers with respect to the navigation in the said docks, or in any wise relating thereto. That section keeps alive the jurisdiction which is given by s. 52 of the Harbours, Docks, and Piers Clauses Act, 1847, to the dock master of the Victoria Docks. During the whole period of the towing the tug was within the limits of the jurisdiction of the dock master. If the bye-law was intended to operate within those limits, it would be inconsistent with s. 52, and, consequently, would be ultrà vires.

*C. E. Jones*, for the respondent. The act of towing the barges into the dock by means of the tug was equivalent to navigation of the tug. The case of *Elmore* v. *Hunter* (1) is an authority that the act of applying motive power by means of a steamboat is itself navigation within the meaning of these bye-laws.

[LORD COLERIDGE, C.J. Is not what was done here the exact equivalent of hauling the barges in by means of a rope worked from a fixed engine on the dock premises?]

No. Bye-law 61, which provides that the owner of craft going into or out of any dock may lawfully cause them to be so removed by an unlicensed person by means of boat-hooks or lines but not by oars, draws a clear distinction between the application of motive power from the shore and from the water. By excepting the former from the term "navigation," it impliedly includes all forms of the latter.

LORD COLERIDGE, C.J. We have in this case to construe a bye-law, which, if fairly construed and confined within reasonable limits, is a very reasonable and useful bye-law. The words are these: "That if any person when in charge of, and navigating any steamboat on the river, between Vauxhall Bridge and the

(1) 3 C. P. D. 116.

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entrance to the Victoria Docks, shall at the same time tow more than six barges, lighters, or other craft, exceeding ten tons each, attached thereto, or if such barges, lighters, or other craft shall not be well and sufficiently attached and fastened to such steamboat and to each other so that the same or either of them shall go adrift, the owner thereof, or the person in charge of or navigating the same, shall incur a penalty not exceeding forty shillings." What is the fair construction of that? It seems to me that the difficulty in the way of the respondent's contention is to bring the facts of the case within any reasonable construction of the word "navigating."

I do not express my opinion with any great degree of confidence, because I know that on such questions as this different minds will take different views. But one must look at the object of the bye-law, and that object, as it seems to me, was to prevent the danger, pointed out by Grove, J., in *Elmore* v. *Hunter* (1), that, where a tug was towing a long string of barges up or down the stream, and came to the bends of the river, the tug on rounding the curve might lose control and the barges proceed on their former course. It is quite reasonable to suppose that when navigating along the course of the river a tug would not have proper control over more than six barges. And, therefore, so far as the ordinary navigation of the river is concerned, this is a very proper bye-law; and had the tug in the present case been towing the barges along the stream it would undoubtedly have come within the bye-law. But that was not what happened here. All that the tug did was to haul the barges, which were already collected immediately outside the dock gates, through the gates into the dock. I asked whether, supposing that the hauling power, instead of being a steamboat had been a steam-engine fixed on the land, the process of hauling the barges into the dock could have been said to be "navigating" them, and it was admitted that it could not; but then the reason given for that was that that method of shifting the position of craft was expressly excepted by bye-law 61. It may be that it was so excepted; but I do not agree that the mere fact that one mode of shifting craft was excepted from the term "navigation" necessarily goes to

(1) 3 C. P. D. at p. 119.

shew that every other mode of shifting them was intended to be included within it.

No doubt, as an abstract proposition, the word "navigate," if used in the widest sense of the term, would include such an operation as was conducted here, but I do not think that that operation was a navigation of the tug within the meaning of the bye-law, having regard to the object with which it was framed.

The question whether the bye-law applies to this particular portion of the river I will not decide, as we have not heard the respondent's counsel upon the point, though, as at present advised, I am strongly of opinion that it does not.

The magistrate's decision was wrong, and the conviction must be quashed.

WILLS, J. I am of the same opinion, and for the same reasons.

*Conviction quashed.*

Solicitors for the appellant: *J. A. & H. E. Farnfield.*

Solicitor for the respondent: *C. S. Sharman.*

J. F. C.

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THE QUEEN *v.* THE JUDGE OF THE CITY OF LONDON COURT AND THE OWNERS OF THE S.S. MICHIGAN.

*June* 10, 11.

*Admiralty—Jurisdiction—Action in Rem for Wages—Maritime Lien of Mate for Wages earned in Port—County Courts Admiralty Jurisdiction Act,* 1868 (31 *&* 32 *Vict. c.* 71).

A ship having arrived in the port of London, which was her destination, her crew, including the mate, were paid off. The mate, after being so paid off and without signing any fresh articles for the outward voyage, remained on board by the direction of the owner for the purpose of superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage. After the inward cargo had been discharged and a portion of the outward cargo had been shipped on board, the ship was taken into dock for repairs, and the mate continued on board by the owner's direction to superintend the execution of such repairs. The owner having become bankrupt, the mate brought an action in rem on the Admiralty side of the county court to recover the wages due for the services so rendered by him on board the ship while in port:—

*Held*, that the services so rendered were maritime services, and that the Court had jurisdiction to entertain the action.

APPLICATION for a rule to the judge of the City of London Court to hear and determine an action.

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This was an action in rem, brought on the Admiralty side of the City of London Court against the steamship *Michigan*, by one H. Barnes, to recover a sum of 45*l.* 12*s.* 10*d.*, due to him as mate of the said ship for wages and victualling money. The *Michigan* was a vessel belonging to the port of London. The plaintiff had made several voyages in her as chief mate. Some time in the first week of November, 1889, she arrived in the port of London on a voyage from America, and on the 8th of that month the whole of the crew, including the plaintiff, were duly paid off. As on previous occasions, the plaintiff, after being paid off, and without signing any fresh articles for the outward voyage, remained on board by the direction of the owner at the same rate of wages as he had had while at sea, with an addition of 2*s.* 6*d.* a day for victualling-money while the vessel remained in port. He remained on board for the purpose of superintending the discharge of the inward cargo and the loading of a fresh cargo for the outward voyage. After a portion of the outward cargo had been loaded, repairs were found to be necessary; in December the ship was taken into the Victoria Graving Dock, and the plaintiff continued on board to superintend the repairs. In March the owner of the ship became bankrupt, and there was then due to the plaintiff for wages for his said services on the ship while in port and for victualling-money the sum of 45*l.* 12*s.* 10*d.* He accordingly instituted the present action. The judge held that he had no jurisdiction to entertain the action, on the ground that the plaintiff, not having been on the ship's articles at the time in respect of which the wages were claimed, was not at that time a seaman within the meaning of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), and consequently had no maritime lien for such wages. He accordingly dismissed the action. The plaintiff having obtained a rule calling upon the learned judge and the owners of the *Michigan* to shew cause why the judge should not hear and determine the action.

*Aspinall*, for the owners, shewed cause. The jurisdiction of the county court is given by 31 & 32 Vict. c. 71, by s. 3, sub-s. (2) of which such Court is empowered to determine

claims for wages not exceeding the sum of 150*l.* But that must be read as limited to wages earned by a seaman as such. For the High Court of Admiralty never had, either at common law or by statute, jurisdiction in rem over wages earned by persons other than seamen: and there is a series of cases which establish that the Act 31 & 32 Vict. c. 71, does not confer on the county court a more extensive jurisdiction than that exercised by the Admiralty Court. The question, therefore, is whether these wages were earned by the plaintiff as a seaman. The judge was right in holding that they were not, for the old articles were gone and no new ones were signed, and the engagement of seamen as such operates only from the time of signing the articles. See the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104, s. 149).

In the cases of *Wells* v. *Osman* (1), and *Re The Great Eastern Steamship Co.* (2), it was no doubt held that seamen engaged in rendering services on board a ship in port might sue in rem for their wages; but in both those cases the parties were engaged for a voyage, although in fact the ships never proceeded on the voyages contemplated. Here there is nothing to shew that the plaintiff was engaged for the outward voyage.

*A. E. Nelson,* for the plaintiff. The services performed by the plaintiff were services rendered to the ship, and he was consequently entitled to a maritime lien for his wages. It was on this ground that Chitty, J., proceeded in *Re The Great Eastern Steamship Co.* (2) No articles had been signed in that case; but that was held to be immaterial. That case is, therefore, an authority in the plaintiff's favour. In *The Jane and Matilda* (3), Lord Stowell held that a woman who had acted as caretaker of a ship and her stores while in harbour and dock had a maritime lien for her wages. And, moreover, the master of this very ship has already recovered his wages in an action in rem in the High Court before the registrar without objection. It is not customary to sign the articles for a voyage until just before the voyage commences. That the plaintiff was a seaman at the time of the services rendered by him is clear from the definition of the term "seaman" in s. 2 of the Merchant Shipping Act, 1854: "'Seaman'

(1) 2 Ld. Raym. 1044. (2) 5 Asp. Mar. Law Cas. 511.
(3) 1 Hagg. Adm. 187.

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shall include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship."

[LORD COLERIDGE, C.J. That definition would include a stevedore. Would he be entitled to a maritime lien?]

No; because neither is he a seaman in the ordinary sense of the term, nor are his services rendered to the ship.

LORD COLERIDGE, C.J. We have had an opportunity of consulting the learned judge of the Admiralty Court, who has had a large experience in these matters, and although my own impression was at first the other way, I defer to his authority, and come to the conclusion that the county court judge was wrong, and that an action in rem will lie at the suit of a person in the position of the present plaintiff. To allow of that remedy in such cases as this has, it appears, been the practice of the Admiralty Court.

I find that we are not embarrassed with the consequences which I was afraid would follow if our decision proceeded upon the definition of the term "seaman" in the Merchant Shipping Act—a definition which would undoubtedly include such a person as a stevedore. For the question here does not depend in any way upon the Merchant Shipping Act, inasmuch as the Act of Parliament giving Admiralty jurisdiction to county courts does not incorporate that Act. The action ought to be heard. The rule must, therefore, be made absolute.

WILLS, J. I am of the same opinion. I have had the opportunity, not only of speaking to my brother Butt upon the subject, but also of looking into the question for myself, and, upon consideration of the authorities, I have independently arrived at the same conclusion. The case seems to me to be practically governed by the case of *The Jane and Matilda* (1), where Lord Stowell held that the woman who had acted as caretaker was entitled to claim against the ship—a decision which, so far as I can make out, seems to be entirely in accordance with the uniform current of authority. The right to proceed in rem for

(1) 1 Hagg. Adm. 187.

services rendered on board a ship apparently extends to every class of person who is connected with the ship as a ship, as a sea-going instrument of navigation, or of transport of cargo from one place to another, and to services rendered by such persons in harbour just as much as to services rendered by them at sea.

It is, of course, matter of common knowledge that one of the most essential parts of the chief mate's duty is to look after the cargo, and see that proper care is taken of it. I am of opinion that the services rendered by the plaintiff were maritime services, although the vessel was actually in harbour at the time.

*Rule absolute.*

Solicitors for plaintiff: *Lowless & Co.*
Solicitors for owners: *Botterell & Roche.*

J. F. C.

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[IN THE COURT OF APPEAL.]

*July* 24.

DECROIX, VERLEY ET CIE. *v.* MEYER & Co., LIMITED.

*Bill of Exchange—Negotiable Instrument—Acceptance, whether qualified—Words prohibiting Transfer—Acceptance "in favour of Drawer only"—Bills of Exchange Act,* 1882 (45 & 46 *Vict. c.* 61), *ss.* 8, 19, 36.

A bill of exchange being drawn by L. D. Flipo payable "to order L. D. Flipo," the drawees struck through the word "order" and accepted the bill "in favour of L. D. Flipo only, payable at the Alliance Bank, London." In an action upon the bill by indorsees for value against acceptors:—

*Held* (reversing the judgment of Cave and A. L. Smith, JJ.), that the acceptance did not vary the effect of the bill as drawn, and that it was therefore a general acceptance of a negotiable bill, and the action was maintainable.

APPEAL from the judgment of the Queen's Bench Division (Cave and A. L. Smith, JJ.) upon a special case, the facts of which were in substance as follows.

The action was brought by the plaintiffs as indorsees against the defendants as acceptors of a bill of exchange. The bill was drawn by one L. Delobbel Flipo, a merchant in France, upon the defendants, an English company carrying on business in London, in the following terms: "On October 31, after date pay to order Mr. L. Delobbel Flipo, 778*l.* 4*s.* 2*d.*" The acceptance by the defendants was as follows. The word "order" was

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struck through, and across the face of the bill were written the words, "In favour of Mr. L. Delobbel Flipo only." Below these words were impressed with a stamp the words, "Accepted, payable at the Alliance Bank, London, for H. Meyer & Co., Limited." Then followed the signatures of two directors of the defendants' company countersigned by the secretary. Flipo indorsed the bill to the plaintiffs for value. Upon presentment for payment, the Alliance Bank refused payment upon the defendants' instructions. The Divisional Court held, that the acceptance was a qualified acceptance, rendering the bill not negotiable, and they therefore gave judgment for the defendants.

*Finlay, Q.C.*, and *R. M. Bray*, for the plaintiffs. The bill as originally drawn was a negotiable bill, and the striking through of the word "order" did not alter the effect of it, for by the Bills of Exchange Act, 1882, s. 8, sub-s. 4, "a bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer or indicating an intention that it should not be transferable." By s. 19 of the Act an acceptance may be either general or qualified, and a qualified acceptance is one which in express terms varies the effect of the bill as drawn. This acceptance does not come within any of the instances of qualified acceptances given by s. 19. By s. 36 it is provided that, where a bill is negotiable in its origin, it shall continue to be negotiable, until restrictively indorsed or discharged by payment or otherwise. The words which were added in this case to the acceptance cannot nullify its effect, as suggested for the defendants. They are mere surplusage, and do not vary the effect of the bill. A bill is always accepted in favour of the payee, and of him only. If the acceptor means to render the bill non-negotiable, he must do so in plain terms. The words here are at best ambiguous, and in favour of an indorsee for value they must be construed ut res magis valeat quam pereat. *Steele* v. *McKinlay*. (1) The result of the construction contended for by the defendants is that there was practically no acceptance of the bill at all.

(1) 5 App. Cas. 754, at p. 781.

*Horne Payne, Q.C.*, and *G. S. Bower*, for the defendants. Sect. 8, sub-s. 1 of the Bills of Exchange Act, 1882, shews that there may be a bill, which is valid as a bill between the original parties, but is not negotiable. Such a bill is not a nullity. It is effective as a bill for certain purposes. It would not be necessary to prove consideration for it, and it probably would be within the enactments providing for a summary remedy on bills of exchange: Byles on Bills (9th Ed. p. 80); *Smith* v. *Kendall* (1); *Rex* v. *Box* (2); *Robertson* v. *Burdekin*. (3) This is a qualified acceptance. The instances of qualified acceptances given in s. 19 are clearly not exhaustive. The terms of the bill and acceptance must be read together as forming the contract. The word "bill" in s. 8, sub-s. 4, and s. 36 of the Bills of Exchange Act, clearly means the bill as accepted. The question whether the bill is negotiable in its origin depends on the terms of the bill and acceptance taken together. For this purpose the acceptance is part of the bill. The plaintiffs are in this dilemma: either this is not an acceptance at all, or it is an acceptance which prohibits transfer. The acceptor can only be sued upon the contract he has entered into, and in accordance with the terms which he has agreed to. He may be willing to be liable on the bill to the drawer only, but not to an indorsee; for he would not be allowed to set-off against the indorsee any claim he might have against the drawer.

[BOWEN, L.J. If it were the intention that the amount of the bill should merely be an item in the account between the acceptor and the drawer, the words indicating that the bill was accepted payable at a particular bank would be most inappropriate and misleading.]

It is clear that the defendants never intended to accept this bill as a negotiable bill, for they struck out the word "order."

[LORD ESHER, M.R. It may be that the striking out of that word indicates what their real intention was; but, inasmuch as the 4th sub-section of the 8th section of the Bills of Exchange Act makes a bill payable to a particular person payable to his order, it has really no effect on the meaning of the bill, and the

(1) 6 T. R. 123. (2) 6 Taunt. 325.
(3) 1 Ross, Leading Cases in Commercial Law of England and Scotland, 812.

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question must be whether, by the terms of the acceptance itself, the defendants have effected such intention.]

It is contended that the bill and acceptance must be taken together as an instrument for this purpose, and, as accepted, the bill was payable to a particular person without the word "order," and did contain words indicating an intention that it should not be negotiable. The words "in favour of Flipo only" sufficiently indicate an intention that the bill shall not be negotiable. The contention of the plaintiffs gives really no effect to the word "only."

[BOWEN, L.J. Do not the words "in favour of" a person, used in connection with a bill of exchange, mean "payable to such person or his order"? And, if so, does the addition of the word "only" make any difference?]

The natural meaning of the words is "payable to," not "payable to or to the order of."

*Finlay, Q.C.*, in reply. The defendants may have meant to prohibit the negotiation of the bill; but, if the words are ambiguous, and do not plainly import non-negotiability, at any rate as against an indorsee for value, they must, according to the well-known rule, be construed most strongly contra proferentem.

LORD ESHER, M.R. The plaintiffs, as indorsees for value, sue the defendants as acceptors of a bill of exchange; and the question is whether the action is maintainable. The instrument in question was drawn by a foreigner on an English company, carrying on business in England, and is subject to the provisions of the Bills of Exchange Act, 1882. It was presented for acceptance, and, upon its being so presented, the name of the defendants was written across the bill. When a person to whom a bill of exchange is presented for acceptance writes his name across the bill, primâ facie he accepts the bill according to its tenour and effect. An acceptance may be qualified, but primâ facie an acceptance is an acceptance according to the tenour of of the bill. What is the tenour of this instrument? Apart from the Bills of Exchange Act, I think that the bill, though awkwardly drawn, is a bill drawn payable to the drawer or to his order. At any rate, by virtue of the Bills of Exchange Act, it

would have the same effect as if it were drawn payable to his order. Therefore, primâ facie, the tenour of the bill is that it is drawn and to be accepted payable to him or to his order. It is contended that, though the defendants have accepted it, they intended to make a qualified acceptance of it. I think that probably they did really so intend; but the question is whether they have effectually qualified what is primâ facie the effect of acceptance. It was argued that their intention was shewn by the fact that they struck out the word "order" from the bill. I think that that was an improper act. If a bill drawn by one merchant upon another is presented for acceptance, the drawee has no right to alter the bill. If he is not willing to accept the bill, he may refuse to do so. If he wishes to accept conditionally or in a qualified manner, he may express the acceptance accordingly; but he ought not to alter the bill. Apart from the Bills of Exchange Act, I doubt whether, if a drawee accepted generally in the ordinary way, his striking through the word "order" would have any effect. I am inclined to think that he might, nevertheless, be taken to have accepted the bill according to its tenour as drawn; but, even if that be not so, the effect of the 4th sub-section of the 8th section of the Bills of Exchange Act is immediately to put the word in again. Therefore this bill, notwithstanding the striking out of the word "order," remained a bill drawn payable to Flipo or order. No doubt the act of striking out the word "order" tends to shew that the defendants intended to make a qualified acceptance; but the question is whether, upon the true construction of the terms of the acceptance, they have succeeded in doing so. Primâ facie they have accepted; and a person who accepts a bill which would, according to the terms in which it is drawn, entitle the payee to indorse it over, must qualify such acceptance in plain terms if he wishes to prevent the bill from being negotiable. If the language he uses leaves the matter doubtful, I should say that, even as against the drawer, but certainly as against a bonâ fide indorsee for value, he must be taken to have accepted the bill generally. Here the defendants have used a mercantile expression which is generally used in relation to bills of exchange and promissory notes. They say that they accept "in favour of" Flipo only. What is the

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meaning of the expression "in favour of" in this connection? If a person says that he has drawn a bill in favour of another person, he means, I think, that he has drawn a bill of which such other person is the payee. If he says that he has drawn a bill in favour of such other person only, the meaning would be that he has drawn a bill in which such other person is the only payee mentioned. That seems to me to be the mercantile meaning of the expression. So, in an acceptance, the words "accepted in favour of Flipo," seem to me to indicate that the acceptance is of a bill of which Flipo is the drawer or payee. Then, is the mercantile effect altered by adding the word "only"? It seems to me that the meaning is merely that the acceptance is of a bill of which Flipo is the only drawer. The words have no mercantile effect upon the bill as drawn. If we construed the expression as suggested, it would have a very bad effect in a mercantile point of view. Such an acceptance would operate as a trap for indorsees. It appears to me that the defendants probably intended to make a qualified acceptance as suggested, but that they have used language which fails to carry out that intention. They have not, in express terms, varied the effect of the bill as drawn, as required by s. 19, sub-s. 1. As to the argument that the bill and the acceptance must be read together so as to make the acceptance a part of the bill, I protest that the acceptance is not part of the bill. When the bill is accepted, the two together make the contract; but the acceptance is distinct from the bill, and the Bills of Exchange Act recognises the distinction. It gives a definition of a bill, and deals with its effect; and it gives a definition of acceptance, and deals with its effect, treating them as distinct. I think it is true to say that in s. 19 of the Act the examples given of a qualified acceptance are not exhaustive, and that there might be other cases of qualified acceptances, when the acceptance in express terms varied the effect of the bill as drawn. But that does not solve the question in this case. The question is whether the defendants have varied the effect of the bill as drawn in express terms. In my opinion, they have not succeeded in doing so by the words they have used. I think the true construction of this acceptance, therefore, is that it has the effect of an absolute general acceptance.

For these reasons, I cannot agree with the judgment of the Court below, and I think this appeal must be allowed.

LINDLEY, L.J. This is a case of some difficulty. The principle laid down by the Master of the Rolls appears to me to be sound, viz., that an acceptance must be construed most strongly against the acceptor. Here the defendants have used words which are at best ambiguous. It appears to me that, if they intended to qualify their acceptance as suggested, they have not done so with sufficient clearness to produce the desired result. If we held otherwise, I think such acceptances would be traps for the unwary. It was argued that in substance the acceptance was expressed to be payable to Flipo only, so as to exclude indorsees, and reduce the effect of the bill to that of a mere acknowledgment of a debt due to Flipo only. If that was the meaning intended, I do not think that the words make it sufficiently plain.

BOWEN, L.J. It seems to me to be of the highest importance in mercantile business that words which are alleged to qualify an acceptance should be construed most strongly against the acceptor. If a bill which has a certain meaning is presented to a merchant and he is not willing to accept it, why should he put his name across it? If he does so, and intends to qualify what would be the ordinary effect of an acceptance, he must do so clearly, so that one who runs may read. If authority were needed for this proposition, it will be found in the case of *Smith* v. *Vertue.* (1) Is the true construction of this acceptance that it is a qualified acceptance as suggested? If so, I think it would be most misleading. The drawer is a foreigner. When the bill is presented for acceptance, the defendants write upon the face of the bill the words, "in favour of Mr. L. Delobbel Flipo only," and then below these words impress with a stamp in the ordinary way the words, "Accepted payable at the Alliance Bank, London. H. Meyer & Co., Limited." The effect of the words stamped would be most misleading if the bill were not intended to be negotiable. Why should words importing that the bill was accepted payable at a particular bank be used, if the intention was that the bill should only be payable to the drawer himself and to

(1) 30 L. J. (C.P.) 56.

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no one else? On that footing these words are quite unintelligible. The ordinary way of qualifying an acceptance would be to insert the qualifying words among the stamped words which import acceptance. But here, above words stamped in the usual form importing a general acceptance, the defendants insert in writing separately the words, "In favour of L. Delobbel Flipo only." Any one who saw these words would have to construe them to arrive at their meaning. The question is, what is their meaning? The bill itself was originally drawn payable to order. The word "order" was, it is true, struck through; but the effect of the 4th sub-section of the 8th section of the Bills of Exchange Act is to put it in again. What do the words "in favour of Flipo" mean? They mean, as it seems to me, "payable to Flipo or order." A bill drawn in favour of a person is a bill drawn payable to such person or his order. If that be so, the addition of the word "only" has no effect on the signification. If the words had been "payable to Flipo only," the case would have been different, and possibly the acceptance would have been qualified. In this case I think the acceptors have missed their mark. In the interest of ordinary business transactions, I cannot say I am sorry that, having used ambiguous language, they should be held to the strict construction of such language. Reading the instrument as a whole, I come to the conclusion, not only that upon the true construction the defendants have failed to do what it is alleged they intended, but also that it might lead to great hardship in business transactions if such an acceptance were construed as qualified in the manner suggested. That being so, I do not think we ought so to construe it unless we are compelled by the words, which, as I have already said, does not appear to me to be the case. The construction of the acceptance is of course for the Court; but I think that any jury of mercantile men, if they had to construe it, would say that the defendants' was not the true construction of it. For these reasons I think that the appeal should be allowed.

*Appeal allowed.*

Solicitors for plaintiff: *Gilbert E. Samuel.*

Solicitors for defendants: *Wm. Webb & Co.*

F. L.

[IN THE COURT OF APPEAL.]

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*June* 8.

GRESHAM LIFE ASSURANCE SOCIETY *v.* STYLES.

*Revenue—Income Tax—Annuities payable out of Profits or Gains—Assessment of Profits or Gains—*5 & 6 *Vict. c.* 35, *Sched. D., s.* 100, *Case I., Rule* 4; *s.* 102.

An insurance society granted life annuities in consideration of a single sum paid by the applicant at the time of granting the annuity, and they claimed to deduct from the amount of their profits chargeable with income tax the sums paid by them in discharge of the annuities so granted:—

*Held* (affirming the judgment of the Queen's Bench Division), that the annuities were paid out of "profits or gains" within the meaning of 5 & 6 Vict. c. 35, s. 102, and were, therefore, chargeable with income tax in the hands of the society by virtue of that section.

APPEAL from the judgment of the Queen's Bench Division (1), on a case stated by Commissioners of Income Tax.

The following were the material facts:—

The Gresham Life Assurance Society carries on the business of life assurance and of granting annuities. The consideration for the granting of an insurance of a lump sum payable on death is either the payment periodically of sums of money or premiums, or in some cases the payment of a lump sum as a single premium at the time of effecting the insurance. The consideration for granting an immediate annuity is the payment of a lump sum or premium.

The annuity obligations of the society when undertaken are in many instances dischargeable abroad. The returns of the society as regulated by the Life Assurance Companies Act, 1870, are based upon (inter alia) actuarial calculations of prospective liabilities under existing contracts.

The return for the three years ending June 30, 1885, shewed, by an account called the valuation balance-sheet, a surplus profit for these three years of 97,553*l.* 2*s.* 9*d.*, from which was deducted the surplus, brought forward from the previous triennium, of 4496*l.* 6*s.* 1*d.*, leaving a balance of 93,056*l.* 16*s.* 8*d.* The society during these three years paid income tax on a sum of 120,722*l.*

The society, in arriving at the amount of profits and gains for

(1) 24 Q. B. D. 500.

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the three years, amounting as above shewn to 93,056*l.* 16*s.* 8*d.*, had taken into account as items of expenditure (among other items) the sum paid in discharge of its annuity contracts amounting to 253,252*l.* 5*s.* 10*d.*, and the sum of 3247*l.* paid for income tax. These two latter sums added to the above sum of 93,056*l.* 16*s.* 8*d.*, amount to 349,556*l.* 2*s.* 6*d.* From this amount the Surveyor of Taxes allowed the sum of 120,722*l.*, upon which tax had been already paid, to be deducted, and claimed that the society were chargeable for the three years with the difference of 228,834*l.* 2*s.* 6*d.* One year's proportion of this sum amounts to 76,278*l.* 0*s.* 10*d.*, for which amount the society was assessed for the year ending April 5, 1886.

The Commissioners confirmed the assessment, and stated a case, the question for the opinion of the Court being, "Whether the society is liable to be assessed in respect of the amount paid by them for annuities or any part thereof."

The Queen's Bench Division dismissed the appeal, and gave judgment for the respondents, against which the appellants appealed.

*Sir H. Davey, Q.C.*, and *Lumley Smith, Q.C.* (*W. Cracroft Fooks*, with them), for the appellants. These annuities are not paid out of profits or gains. The suggestion that they come out of profits, because if they were not paid the profits or gains would be so much greater, is a fallacy, for without the obligation to pay the annuities there would be no lump sums received by the society. The society trade in the sale of annuities and the payment of the annuities granted has to be made in order to earn the profits, and the amount of such payments should be deducted in arriving at an estimate of the profits of the society. Such payments, made in the way of business, are not the annuities referred to in the 4th rule of Case I., s. 100 of 5 & 6 Vict. c. 35, which says that in estimating the amount of profits and gains under Sched. D. no deduction is to be made on account of any annual interest, or any annuity or other annual payment, payable out of such profits or gains. *Last* v. *London Assurance Corporation* (1) is an authority to shew that these lump sums or premiums are not profits or

(1) 12 Q. B. D. 389.

gains, and that part of the decision in that case was not reversed in the Court of Appeal. (1) Treating the society as any other trader is treated, the profit or loss in any three years is not the the difference between what they have received and what they have paid in those years, but the difference between the balance of the actuarial values of assets and liabilities at the beginning of the three years and the like balance at the end. Under the special circumstances of the trade that the society carries on no proper balance-sheet can be made out on any other footing. The Customs and Inland Revenue Act, 1888, s. 24 (51 & 52 Vict. c. 8), meets this case, and this fact is strong evidence that before that Act there was no obligation on the appellants to deduct income tax when paying these annuities.

*Sir E. Clarke, S.G.*, and *Danckwerts*, for the respondent. It is not a question of the taxable income of the society, but whether under the machinery provided by the Income Tax Acts they are not bound to deduct income tax before paying the annuities. It is not sought to recover any arrears of income tax, but only to establish that the Crown may look to the society and not to the recipients of the annuities. These are annuities that the society pays, and there is nothing in the Acts to limit rule 4 of Case I., s. 100 of 5 & 6 Vict. c. 35, to any particular class of annuities: *Alexandria Water Co.* v. *Musgrave.* (2)

*Lumley Smith, Q.C.*, in reply.

LORD ESHER, M.R. In my opinion this case is governed by the rule of construction laid down in *Alexandria Waterworks Co.* v. *Musgrave.* (2) A rule of construction was there laid down and applied to the 4th rule of Case I., in Sched. D., which seems to me to be the rule governing the decision in this case.

This society is carrying on business, and the part of their business with which we are concerned is that they sell annuities, or, if it is put in ordinary language, they grant annuities in consideration of money paid to them. What we have to see is what is the profit of that business upon which the Government is entitled to receive income tax. But for the 4th rule and the 102nd

(1) 14 Q. B. D. 239. (2) 11 Q. B. D. 174.

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section I should have no doubt but that the income on which the Government would be entitled to charge income tax would be arrived at by taking the difference between what was received in any three years and what it cost to obtain those receipts. Such a difference in any year is the annual income of a tradesman, and whether the way of getting at that is by means of an actuary or by some plain simple method seems to me to be immaterial. Then I have, further, no doubt that the receipts of this business would be the price paid by the proposed annuitants, and that one of the expenses would be the amount of the annuities which had to be paid in respect of the sums which had been received. But then comes the 4th rule, and it seems to me that rule lays down something different from that which would have been applicable if the rule had not been there. There would be hardship but for other clauses which get rid of it and produce this effect, that the amount which the Government receives by way of income tax is not increased, but the mode in which that amount is collected is altered so that it can be collected from the person who pays. Now what was the interpretation put on rule 4 in the case of *Alexandria Water Co.* v. *Musgrave*? (1) It seems to me to be this—that for the purpose of the collection of income tax the words "profits and gains" in the rule mean the credit side of the account. If so, that means the trade receipts over the period. Then, in making up the other side of the account for this purpose of taxation, no items on account of annual interest or an annuity or other annual payment are to be put on that side of the account, although, but for the rule, they would be properly placed in the account as expenses. That was held with regard to "annual interest" in the *Alexandria Water Co. Case.* (1) Applying that holding to the next item in rule 4, that is to "annuities," then, although these annuities would, but for the rule, have been expenses which would have to be deducted before you could get at the net profit, the Act has said, reading it according to the ordinary meaning of the English language, that these annuities are not to be taken into the account. That is the judgment of the Divisional Court, which I think was right, applying the rule of construction laid down

(1) 11 Q. B. D. 174.

in the *Alexandria Water Co. Case* (1), and therefore this appeal fails, and our judgment must be for the Crown.

LINDLEY, L.J. I have entertained some doubt about this case in consequence of the difficulty of putting a construction on all the words of these sections; but I have come to the conclusion that the decision of the Court below is right. The case turns on the true construction of the 4th rule in Sched. D and on s. 102, and upon the construction or interpretation which was put upon rule 4 in the case of *Alexandria Water Co.* v. *Musgrave.* (1) It is quite obvious when we look at the rules in Sched. D that the rules laid down for the purpose of ascertaining the balance upon which income tax is to be assessed are very different from the rules ordinarily employed in trade in ascertaining the net profits divisible among those who carry it on. That is made plain by running the eye down rule 3. There are all sorts of things which are not to be inserted which traders would insert in order to ascertain the net balance to divide among themselves, and the language of the rule itself is significant. I cannot help thinking that when the rule says that certain things are not to be deducted from or set against profits or gains that this latter expression means the items on the credit side of the account. The tax is upon the balance, and there is nothing expressly said about deducting any losses, the only authority for any deductions being the expression "balance of profits and gains," and it is only by implication that you get at how a balance is to be struck. It appears to me therefore that the annuities in this case are payable out of such profits or gains as are referred to in the rules to Sched. D. or, to vary the expression, they are annuities payable out of the profits or gains brought into charge by virtue of this Act, which is the expression used in s. 102. Having regard to the construction already placed on these phrases in the *Alexandria Water Co. Case* (1), it appears to me, though I had some doubts about it at first, that the decision appealed against is right.

LOPES, L.J. It appears to me that the decision of this case depends on the 4th rule of Case I. of Sched. D. of the Act of 1842,

(1) 11 Q. B. D. 174.

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and on the 102nd section of that Act. If it were not for the rule and the section I should have thought without doubt that the appellants would have been entitled to make the deductions which they now claim to make—in point of fact, they would have been entitled to make such deductions as any other commercial undertaking would be entitled to make in respect of expenses incurred in carrying on their trade, deducting those expenses so as to get at the net result. But it appears to me that the legislature intended a different result, and a different machinery for collection, to be applicable to annuities or other annual payments. I think that in the 4th rule by "profits and gains" are intended receipts—trade receipts, that is, the credit side of the account; and I think this view is strengthened by the different phraseology used in the different rules. In the first rule of Case I. we have the expression "full amount of the balance of profits or gains," in the third rule we have "the balance of profits and gains chargeable," and when we come to the 4th rule a different term is used, "the amount of the profits and gains arising as aforesaid." I think this difference of expression was in consequence of the different state of things applicable to the different rules. The view that "profits and gains" in rule 4 means the credit side of the trade account is strengthened by s. 102 of this Act. It is to be observed that there is nothing harsh or unreasonable in this construction, which merely makes the society liable primarily to pay the tax, they having full authority to deduct it from the annuity when they pay the annuitant.

I have only further to say that the view we now take of the construction of this rule is entirely consistent and in accordance with the *Alexandria Water Co.* v. *Musgrave.* (1) I think, therefore, the judgment of the Court below was right, and that the appeal should be dismissed.

*Appeal dismissed.*

Solicitor for appellants: *R. L. Devonshire.*

Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) 11 Q. B. D. 174.

A. M.

THE QUEEN *v.* THE KEEPERS OF THE PEACE AND JUSTICES OF THE COUNTY OF LONDON.

1890
*June* 23.

*Highway—Wilful Obstruction—Summons before Justice—Dismissal of Charge—Appeal to Quarter Sessions—5 & 6 Will. 4, c. 50, ss. 72, 105.*

By the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72, a penalty is imposed on any person who shall wilfully obstruct a highway, and by s. 105 "if any person shall think himself aggrieved by . . . . any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person in pursuance of this Act . . . such person may appeal" to quarter sessions, in manner prescribed.

A summons under s. 72 against a person for wilfully obstructing a highway was dismissed by a justice:—

*Held*, that the informant had no right of appeal under s. 105 against the acquittal of the accused.

RULE nisi for a mandamus to the defendants to enter continuances and hear an appeal against the judgment or determination of a justice of the peace upon the hearing of an information or complaint by the vestry of the parish of Fulham against Lewis Cockerell for unlawfully and wilfully obstructing the free passage of a certain highway called Vereker Road.

It appeared from affidavits that the vestry was incorporated under 48 & 49 Vict. c. 33, s. 3, and under Sched. A., Part 2 of 18 & 19 Vict. c. 120, and by s. 96 of the last-mentioned Act, constituted surveyors of highways, and all streets being highways and the pavements, stones and other materials thereof were vested in the vestry. Lewis Cockerell was summoned for obstructing an alleged highway called Vereker Road, within the parish, by erecting a fence across the road. The magistrate found that the road was not a highway, and dismissed the summons. The vestry appealed to quarter sessions; but the respondent objected that an appeal did not lie from a dismissal of a summons by a Court of summary jurisdiction unless specially provided for by the statute under which the prosecution took place, and that the statute in question did not specially provide for an appeal. The quarter sessions refused to hear the appeal.

June 20. *Candy, Q.C.*, and *Meates*, shewed cause. An appeal from an acquittal in such a case is without precedent. The

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summons was issued under the Highway Act, 1835 (5 & 6 Will. 4, c. 50), s. 72. The defendant, if guilty, was liable to a fine of forty shillings, and in default, imprisonment. It is a criminal proceeding, and the appeal, if it exists, must be given by statute and in express terms. By s. 105, if any person shall think himself aggrieved by . . . . any order, conviction, judgment or determination made, or by any matter or thing done, by any justice or other person in pursuance of this Act . . . . such person may appeal to the quarter sessions. The vestry were not persons "aggrieved." The acquittal was neither an order, conviction, or judgment, and although it may be, in one sense, a "determination," yet the words, as used in this section, mean some adjudication analogous to a conviction and adverse to the defendant. By the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 32, where a person is authorized by any past Act to appeal from the conviction or order of a Court of summary jurisdiction to a Court of general or quarter sessions, he may appeal to such Court subject to the regulations in this Act; and, by s. 33, any person aggrieved who desires to question a conviction, order, determination or other proceeding of a Court of summary jurisdiction on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case. The prosecutors were not authorized by any past Act to appeal; this proceeding was not erroneous in point of law or in excess of jurisdiction, but a decision on a question of fact.

*Lumley Smith, Q.C.* (*Macaskie*, with him), in support of the rule. The proceedings were in order to determine a question of right. The vestry, in whom the highway is vested by the Metropolis Management Acts, would be practically estopped by the decision of the magistrate, although not a judgment of a Court of Record, if they preferred an indictment in respect of the road. There is no general presumption of law against an appeal after an acquittal. The right of appeal by special case, given in s. 33 of the Summary Jurisdiction Act, 1879, would apply to an acquittal; and by 47 & 48 Vict. c. 43 (The Summary Jurisdiction Act, 1884), s. 6, where a person is authorized by an Act passed before the Summary Jurisdiction Act, 1879, to appeal from the convic-

tion or order of a Court of summary jurisdiction made in pursuance of the Summary Jurisdiction Acts, or from the "refusal" to make any conviction or order in pursuance of those Acts, to a Court of general or quarter sessions, he shall appeal, subject to the conditions and regulations in the Summary Jurisdiction Act, 1879, with respect to an appeal to quarter sessions. It is not contended that the Court would grant a new trial after an acquittal on an indictment for non-repair of a highway. But s. 72, under which the present proceedings were taken, is in wide terms, and the penalty imposed of forty shillings is to be "over and above the damages"; so that the proceeding is in the nature of a civil action. The penalty may be recovered by distress, and it is only in default of distress that imprisonment can follow. In *Payne* v. *Justices of the Uxbridge Division of the County of Middlesex and the Uxbridge Urban Sanitary Authority* (1) an information was laid under the Thames Navigation Act, 1866 (29 & 30 Vict. c. 89), ss. 64 and 65, for a misdemeanour in polluting a river, and was dismissed. An appeal was entertained at quarter sessions; but the Queen's Bench Division granted a prohibition on the ground that the statutes then in question gave no power to appeal from a dismissal. That case turned, however, on the construction of the particular statutes. In Archbold's Quarter Sessions, 4th ed., pp. 642, 643, it is said that there is no appeal where a charge has been heard and dismissed by a Court of summary jurisdiction; but the only authority cited for that proposition is the case above referred to. A right to appeal in the present case is given by s. 105 of the Highway Act, 1835. The vestry are persons "aggrieved" by the acquittal because the site of the road is vested in them; and the decision of the magistrates was certainly a "determination" within the terms of the section.

LORD COLERIDGE, C.J. We must decide this case on principle, for no case has been brought before us by the learned counsel on either side in which the point has been directly or even indirectly decided. The question arises on the Act of 1835, and a claim to have an appeal after acquittal is now for the first time made, although there must have been thousands of instances of

(1) 45 J. P. 327, 420.

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acquittals which have dissatisfied the prosecutors. The reason why no case has ever arisen before must, in my judgment, be that, on scanning s. 105, prosecutors who might otherwise have desired to appeal against an acquittal have felt that the language of the section was against them. I do not deny that this is "determination made" by the justice, and may be "a matter or thing done by the justice in pursuance of the Act"; and, therefore, if it were enough to find a word or two in a section of this kind which would carry an appeal, the argument for the appellant would be entitled to succeed, for there are words capable of the meaning contended for. But that is not quite the way in which the section should be regarded when we are asked to hold that there is an appeal after acquittal, which is, primâ facie, not given by law. A person is prosecuted for some breach of the law which is to be proved in a particular way. The general principle of law is that, if acquitted, he is not to be a second time vexed. The learned counsel for the defendants candidly said that that would not technically apply here, for every act of obstruction may be the subject of a fresh summons and determination. But if the matter is within the jurisdiction of the justices there would stand a decision on the very point by a Court of a competent jurisdiction, and no reasonable man would think of deciding contrary to what the former magistrate had decided, especially after a decision in favour of the accused. I hope that I do not misuse the word "broadly," for "loosely" or "inaccurately," but our decision must be governed by broad and well-recognised principles of construction. One of those is, that a man acquitted is not to be again proceeded against with respect to the same matter; another principle is that an appeal is never given except by statute. That brings us to the consideration of section 105. My opinion, on full consideration, is that this section does not give an appeal except in cases of conviction. The section enacts that "if any person shall think himself aggrieved by . . . . any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person in pursuance of this Act"—the words "conviction" and "judgment" seem the governing words, and shew that the object of the legislature was to give an

appeal where the person had something done against him which aggrieved or affected him,—"and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next general or quarter sessions of the peace," &c. Is a person who cannot succeed in getting a conviction against another a person "aggrieved"? He may be annoyed at finding that what he thought was a breach of law is not a breach of law; but is he "aggrieved" because some one is held not to have done wrong? It is difficult to see that the section meant anything of that kind. The section does not give an appeal to anybody but a person who is by the direct act of the magistrate "aggrieved"—that is, who has had something done or determined against him by the magistrate. It is said that the surveyors are "aggrieved," because what they claimed as a highway is found not to be a highway. I am not disposed to adopt the suggestion that this is a question of title. It is true that the surface of the road, if a highway, would be vested in the local authority, and that the respondent claims to have the legal right to the surface vested in him, and, in a sense, there is a dispute between the local authority and the owner of the soil. This is not a question of title, but a question as to the use of the surface of the road. The title to it might be vested in the authority, but they could make no use of it except as a highway. A road is only vested in them as a convenient mode of giving them complete control. But I do not base my judgment on that ground; for the reasons that I have previously given, I think that the defendants must succeed.

WILLS, J. I am of the same opinion. I cordially agree with nearly all the observations of the Lord Chief Justice. Notwithstanding the argument of the learned counsel for the appellants, I think this is distinctly a criminal matter within the decisions of the Court of Appeal, refusing appeals in cases stated by justices. Persons convicted under s. 72 of the Highway Act may escape imprisonment by paying the fine; but the fine is punishment, and imprisonment is inflicted if the fine is not paid. Long before the Highway Act of 1835, there were similar statutory provisions, and yet no instance can be found in the books of

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an appeal successfully prosecuted, or even attempted to be brought, after an acquittal. I have looked with some care into the books where such an instance would, if it existed, be likely to be found, and I have not discovered any, and so far as appears in every work I have consulted which throws light on the subject the appellant is always treated as a person who has been convicted, or suffered something analogous to conviction. The learned counsel for the appellants has also been unable to find any such case, or he would have cited it. The argument arising from the total absence of precedent is almost unanswerable. With respect to the effect of *Coverdale* v. *Charlton* (1), and cases of that kind on the clauses of the Public Health Act, which vest the surface of the roads in the public body having charge over the roads, I do not express dissent from the view taken by the Lord Chief Justice; but I should like further time to consider, if it were necessary to give a decision. My impression is, that the question whether the surface of the road belongs to the owner of the subsoil or to the corporate body in whom, under the Metropolis Local Management Acts or the Public Health Acts, the surface is vested is a question of title to real property. The ownership of the public body is of a limited character it is true, but the thing owned appears to me to be real property. The respondent has set up a right to do an act which he has no right to do if the locus in quo be a highway, and which he has a right to do if it be not a highway. I should have thought, therefore, that the title to realty was involved in the inquiry. But I speak with reserve when I find my Lord's mind travelling in a different direction. It is not, however, necessary to decide the point. I base my judgment on the broad ground that the principles so clearly and forcibly expressed by the Lord Chief Justice are all in favour of the defendants.

*Rule discharged.*

Solicitor for prosecutors: *T. Blanco White.*

Solicitors for defendants: *Lane, Munro, & Soutter.*

(1) 4 Q. B. D. 104.

J. R.

## THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF SALFORD *v.* LEVER.

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*June* 20, 21, 23.

*Principal and Agent—Fraud—Agent bribed to induce Principal to enter into Contract with Briber—Contract disadvantageous to Principal—Remedies of Principal—Recovery of Bribes from Agent—Subsequent action against Briber.*

Where an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and such contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies; he may recover from the agent, as money had and received to his use, the amount of the bribe which the agent has received, and he may also in addition recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss that he may have sustained by reason of his having entered into the contract, without allowing any deduction in respect of the money recovered from the agent under the former head.

The plaintiffs were proprietors of gasworks, and it was the duty of their manager to examine tenders for the supply of coal and advise the plaintiffs thereon. The defendant, a coal merchant, submitted to the plaintiffs tenders for the supply of coal. Before submitting the tenders, and with the view of procuring the manager's recommendation of them, the defendant corruptly agreed to pay to the manager a secret commission or bribe, and, in order to recoup himself for the commission so promised, he inserted in the tenders prices which were in excess of the current market prices by the amount of the commission. The manager, being induced thereto by the promise of the commission, advised the plaintiffs to accept the defendant's tenders, which they accordingly did. The defendant delivered the coals to the plaintiffs, and was paid the prices named in the tenders. He also paid to the manager a considerable portion of the commission which he had promised. The manager received similar bribes from various other contractors, who in like manner obtained from the plaintiffs prices in excess of the market prices. The plaintiffs, upon discovery of the frauds, entered into an agreement with their manager whereby it was agreed that he should assist the plaintiffs, by giving the necessary information and evidence, to bring actions against such contractors (including the defendant) for the recovery of damages for the loss sustained by the plaintiffs in consequence of the frauds, that he should guarantee that the damages recovered in such actions should amount to a certain specified sum, that by way of security for the due performance of the guarantee he should deposit in a certain bank securities to the value of the sum guaranteed, that any sums recovered in such actions should be taken in part satisfaction of the guarantee, and that upon receipt by the plaintiffs of the full guaranteed sum they should give the manager a complete discharge. The manager duly deposited the securities in the bank. After the agreement had been entered into and the securities deposited, the plaintiffs brought an action against the defendant to recover the difference between the prices paid to him for the coal supplied and the current market prices of such coal. It was contended by the defendant that the

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plaintiffs' cause of action was for a tort in respect of which the defendant and the manager were joint wrongdoers, and that the agreement between the plaintiffs and the manager, coupled with the deposit of the securities by the latter, amounted to a discharge of the manager by way of accord and satisfaction, and consequently operated to discharge the defendant also:—

*Held*, that the matters relied on afforded no defence to the action.

By Denman and Charles, JJ., on the ground that the discharge to which the agreement related was a discharge only of the manager's liability to hand over the bribes which he had in fact received, and was not intended as a discharge of his liability to damages for the tort which he had committed jointly with the defendant.

By Vaughan Williams, J., on the grounds that, although the agreement was, in his opinion, intended to operate as a discharge to the manager in respect of both the above-mentioned liabilities, yet, inasmuch as the plaintiffs could not consistently with their corporate duty allow the manager to retain the bribes that he had received, the agreement was void as being ultra vires, and further, that, inasmuch as the amount of the bribes to be retained by the manager was proportioned to the effect of the evidence which he gave, the agreement was void as being against public morality.

MOTION for a new trial.

The plaintiffs were the proprietors of the gasworks in their borough. From the year 1875 to 1887 one Samuel Hunter was employed by them as the manager of their gasworks, and in that capacity it was his duty to examine tenders for the supply of coal for the purposes of the gasworks and to report and advise the plaintiffs thereon. The defendant, who was a coal merchant, submitted to the plaintiffs between the years 1875 and 1878 several tenders for the supply of coal. Before submitting the tenders, and with the view of procuring Hunter to advise the plaintiffs to accept them, the defendant corruptly agreed to pay to Hunter a secret commission or bribe of 1s. per ton on the quantity of coal tendered for, and, in order to recoup himself for the commission so promised to Hunter, he inserted in the tenders prices which were in excess of the current market prices by 1s. per ton. Thereupon Hunter, being induced thereto by the promise of the commission, advised the plaintiffs to accept the defendant's tenders, which they accordingly did. The coal was delivered to the plaintiffs under the contracts so obtained, and the total prices paid to the defendant under such contracts exceeded the current market prices by a sum of 2329*l.* Of the commission promised to Hunter the defendant paid him altogether about 1500*l.* During his tenure of office as the plaintiffs'

manager Hunter received similar bribes from many other coal contractors beside the defendant, and such contractors, for the purpose of covering such bribes, inserted in their tenders and obtained from the plaintiffs prices in excess of the market prices; but there was no evidence that the total amounts of the bribes paid to Hunter, or of the excess prices obtained by the various contractors (including the defendant) exceeded the sum of 10,000*l*. On August 6th, 1889, the plaintiffs, who had in the meantime discovered the frauds that had been committed upon them and had taken proceedings against Hunter in the Chancery Division to recover from him the amount of the bribes that he had received, entered into an agreement with Hunter in the following terms:—

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1. "Hunter to deposit forthwith in the Lancashire and Yorkshire Bank, King Street, Manchester, securities which the said bankers will guarantee shall realize the sum of ten thousand pounds, in the name of the Mayor of Salford and J. C. Walker (Hunter's solicitor), such securities to remain in the hands of the bankers until the date hereinafter named as a guarantee that the sum of ten thousand pounds will then be paid over to the corporation of Salford on the date hereinafter mentioned, and the bankers shall give such a guarantee.

2. "The corporation shall, at the request of Hunter, proceed with any pending actions against former contractors with the corporation, or, at the instance of Hunter, to institute further actions against such contractors for the purpose of recovering any bribes or commissions received by Hunter, or promised to be paid to him, from such contractors.

3. "Hunter to give such information and evidence as may be necessary for the purpose of any such actions or proceedings, and also to pay all costs of or incidental to any such actions or proceedings from this date.

4. "Any sums of money that may be recovered and received in any such actions or proceedings, or which may be paid either to the said S. Hunter or to the corporation by any contractors by way of settlement without action or after action brought, and as

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to the sufficiency of such payment the said S. Hunter shall be the sole judge, shall be paid over to or retained by the corporation, and after deducting costs therefrom the net balance shall be taken in part satisfaction of the sum of ten thousand pounds, it being understood that the corporation are to receive a clear sum of ten thousand pounds, irrespective of a sum of 442*l.* 10*s.* (sometime since recovered by the corporation), and all costs and expenses as before mentioned and no more.

5. "On the 31st day of December, 1889, in case the corporation shall have been unsuccessful in recovering any sum or sums of money in connection with the said actions or proceedings, the said securities, or a requisite part thereof, shall be realised, and the sum of ten thousand pounds shall be paid over to the corporation; and the said Hunter shall in addition thereto pay to the corporation all costs and expenses of and incidental to the said actions or other proceedings which they may have incurred and cannot recover from any other person, or become liable to from this date until the said 31st day of December, 1889, and in case the corporation succeed in recovering and receiving any sum less than the said ten thousand pounds, then the difference between such sums as may have been so received (after deducting all other costs and expenses aforesaid), and the said sum of ten thousand pounds shall be paid over to the corporation.

6. "The corporation shall, at any time prior to the said 31st day of December next, at the request of the said Hunter or his solicitor, discontinue all or any such actions or proceedings as before mentioned, and thereupon the said sum of ten thousand pounds shall be payable to the corporation, together with such costs as before mentioned.

7. "On the receipt by the corporation of the said sum of ten thousand pounds, together with all such costs and expenses as aforesaid, the corporation shall give to the said Hunter a full and complete discharge, and in the meantime they shall take no steps in the Chancery action pending against him and one John Graves Hawkins (1), but the same shall be stayed.

(1) The Chancery action here mentioned was the same as that mentioned above, and J. G. Hawkins, who was joined as a co-defendant in such action, was one of the contractors who had bribed Hunter.

8. "Upon payment into the Lancashire and Yorkshire Bank of any sum of money (to the credit of the Mayor of Salford and J. C. Walker) recovered from the contractors as aforesaid, the said Samuel Hunter shall be entitled to receive and have returned to him a corresponding portion of the said securities deposited; and upon being satisfied that any contractor has paid a sum satisfactory to the said Samuel Hunter as aforesaid, the said corporation shall thereupon give the said contractor a complete and sufficient release from all claims in connection with the said matter."

In pursuance of this agreement, Hunter duly lodged with the bank securities to the value of 10,000*l.* Actions were brought by the plaintiffs against some of the contractors (other than the defendant) who had given bribes to Hunter, and sums were recovered from such contractors amounting in all to 4000*l.* On October 11, 1889, the plaintiffs commenced an action against the defendant to recover the sum of 2329*l.* as damages for fraud in relation to the contracts for the supply of coal by him to the plaintiffs; and, alternatively, as money had and received to the plaintiffs' use. The defendant pleaded, in paragraph 6 of the defence, that if he had paid any bribes to Hunter, Hunter had paid the same to the plaintiffs, or had accounted to or compounded with them in respect thereof upon the terms that the plaintiffs should seek to recover and should stand possessed of the moneys claimed in the action as a trustee for and on behalf of Hunter. The action came on for trial at the Yorkshire Assizes, before Day, J., and a special jury on March 25, 1890.

The judge directed the jury that the agreement between the plaintiffs and Hunter had no bearing whatever upon the relative rights of the plaintiffs and the defendant, and that they must find a verdict for the plaintiffs for the amount claimed. The defendant moved for a new trial on the ground "that the judge misdirected the jury by telling them that there was no evidence which they could take into consideration with a view to reducing the amount of damages claimed, and upon the ground that the judge ought to have directed the jury to find whether (or to have held that) the plaintiffs had been paid or had compounded with their servant Hunter, and whether the action was being main-

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tained for his benefit, and should therefore have entered judgment for the defendant, or should have directed the jury to take into consideration some or all of the above matters, or should otherwise have had regard to the agreement of August 6, 1889, between the plaintiffs and the said Samuel Hunter with a view to the amount of the damages which the plaintiffs were entitled to recover."

*Lockwood, Q.C.*, and *Walton, Q.C.*, for the defendant. It must be assumed that the total amount of the bribes paid by the various contractors to Hunter was 10,000*l.*, and there was no evidence that the total amount of the loss sustained by the plaintiffs by reason of such bribes—that is to say, the total excess prices obtained by the various contractors—exceeded that sum. But of that sum 4000*l.* has already been obtained from certain of the contractors themselves; and as to the remaining 6000*l.*, they have been substantially paid by Hunter; for, December 31, 1889, being now past, the plaintiffs are in a position to realize Hunter's securities to that extent. The plaintiffs, therefore, after having recovered the whole of their loss are now seeking to be paid over again. But even if the plaintiffs' loss in fact exceeded the sum of 10,000*l.* they cannot sue for the balance. For their cause of action is in substance for damages resulting from a conspiracy to which Hunter was a party. But the agreement of August 6, and the deposit of the securities amount, if not to payment, at all events to an accord and satisfaction of the plaintiffs' claim against Hunter in respect of that conspiracy. But satisfaction by one of two joint tortfeasors is an answer to an action against the other. In *Brinsmead* v. *Harrison* (1), this was conceded, the only question there being whether judgment recovered against one joint tortfeasor without satisfaction would suffice to bar the action against the other. Any satisfaction, however small, if accepted as satisfaction, is sufficient for this purpose; and, therefore, even a mere release to one wrongdoer discharges all, on the ground that "a release is as good a satisfaction in law as a satisfaction in deed": *Cocke* v. *Jennor.* (2) [He also cited *Hilman* v. *Uncles* (3), and *Bird* v. *Randall.* (4)] The plaintiffs are

(1) Law Rep. 7 C. P. 547.
(2) Hob. 66.
(3) Skinner, 391.
(4) 3 Burr. 1345.

really seeking to recover this money for the benefit of their own fraudulent servant, for any sums recovered are under the agreement to go in relief of Hunter's liability under his guarantee.

*Waddy, Q.C.*, and *Henn Collins, Q.C.*, (*C. Gould*, with them), for the plaintiffs. The plaintiffs had two distinct causes of action. First, they had a right to recover from Hunter the amount of the bribes which had reached his hands, on the ground that, owing to his incapacity to retain it, it was their money, and they were entitled to treat it as received by him to their use: *Parker* v. *McKenna.* (1) Secondly, they had a right of action either against Hunter and the defendant, jointly or severally, to recover the excess prices of which they had been defrauded as damages in tort, or against the defendant alone to recover such excess prices as money received by him to the plaintiffs' use. But satisfaction of the first cause of action is no satisfaction of the second; the remedies of the plaintiffs are cumulative: per Jessel, M.R., *Emma Silver Mining Co.* v. *Grant* (2); and it was the first cause of action alone which was satisfied by the agreement of August 6. Suppose the defendant, having paid bribes to Hunter, had not succeeded in getting his tenders accepted, the plaintiffs would have been entitled to recover the bribes at once from Hunter, and the defendant would have been a loser by the amount of the bribes paid. But is the success of the defendant's fraud to put him in a better position than he would have been in if his fraud had not been successful? The amounts of the bribes promised to Hunter and of the damages recoverable from the defendant, happen in this case to be identical; but that is a mere accident. The money recoverable from the two parties is not the same money. The bribe might well have been something which was not money at all, such as the procurement of an office for a relation. Again, suppose that the wrong which the agent had been bribed to commit had been a trespass, and judgment had been recovered against the two joint wrongdoers for the trespass and execution had, the satisfaction of that cause of action could not have been pleaded by the agent as a defence to a subsequent action against him to recover the amount of the bribe. But the liability of the agent to disgorge his bribe must

(1) Law Rep. 10 Ch. 96. (2) 11 Ch. D. pp. 937–8.

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be irrespective of the kind of tort which he is bribed to commit. If, therefore, the plaintiffs had sued the defendant and recovered damages from him, and subsequently sued Hunter for the bribes received, the former recovery would have been no defence. Then what difference can it make which action is brought first?

*Lockwood, Q.C.*, in reply.

June 28. CHARLES, J., read the judgment of himself and Denman, J.:—

The plaintiffs in this case sought to recover from the defendant 2329*l.* as damages "for fraud and misrepresentation in and in relation to contracts for the supply of coal and goods to the plaintiffs from the year 1875 forward, and for the secret and fraudulent payment of bribes and commission in respect of such contracts to the plaintiffs' late gas manager and servant, Samuel Hunter." In their pleadings the plaintiffs claimed the money either by way of damages for the defendant's fraud, or alternatively as a liquidated sum wrongfully in the defendant's hands—in other words, as money received for the plaintiffs' use.

The cause was tried at the last Yorkshire (West Riding) Winter Assizes, before Day, J., and a special jury, when the following facts were proved. From the year 1875 to 1887 Samuel Hunter was the gas manager and servant of the plaintiffs. The defendant was during the same period a coal merchant, carrying on business near Salford, and in 1875, 1877, and 1878, he obtained contracts from the plaintiffs through the intervention and on the advice of Hunter for the supply of coal to them at prices in excess of the current market price to the extent of 1s. per ton, or 2329*l.*

This excess the defendant agreed to pay, and did in part pay, to Hunter, by way of secret commission or bribe, in order to procure his recommendation to the plaintiffs of the various contracts which they made with the defendant. It was not disputed that the plaintiffs were primâ facie entitled to recover in some form or other this excess in price from the defendant.

But the defence was based upon an agreement, dated August 6, 1889, before the commencement of the action, between Hunter and the corporation, which it was said prevented this action from

being maintained against the defendant. It becomes important, therefore, to consider what the provisions of that agreement were. It was in the following terms. [The learned Judge read the agreement above set out.]

Mr. Waddy, for the plaintiffs, suggested that the agreement only applied to "former contractors," against whom actions were pending, and against whom subsequent actions might be brought. But we cannot take this view of its provisions. We think it applies to all former contractors, including Lever, and is not limited, in the manner suggested, to such former contractors as were actually then defendants in actions.

Its language is not free from ambiguity, but its general effect appears to be this: that Hunter, who had received bribes from many other contractors beside the defendant, was to deposit with the Lancashire and Yorkshire Banking Company securities guaranteed by the bankers to realize 10,000*l.*, and the plaintiffs were then to continue or commence actions at his cost and his request against the contractors who had received excess prices, and to apply the sums recovered for his benefit, by from time to time returning him securities equivalent in amount to the sums recovered. Hunter, until December 31, 1889, was constituted absolutely dominus litium, and could until then direct the commencement of or the discontinuance of any actions against the contractors. This agreement was acted upon. Securities to the value of 10,000*l.* were lodged in the bank, and this action (amongst others) was commenced, and it was not disputed that the amount recovered under it would go under clause 4, as other moneys, amounting altogether to 4000*l.*, had already gone, in part satisfaction of the sum of 10,000*l.*, and so in relief of Hunter. The learned judge, however, was of opinion that the defendant could not rely upon the agreement and what had been done under it, either as a defence or in reduction of damages; that the plaintiffs had a separate and distinct personal right against him to recover the excess of price which they had paid, and that the mode in which the plaintiffs used the sum recovered was immaterial. They were at liberty, he thought, to apply it, if they could do so consistently with their corporate duty, to the relief of Hunter's securities, without in any way impairing their right

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of action against the defendant. He accordingly directed a verdict for the plaintiffs for the full amount claimed. A new trial was moved for on behalf of the defendant, or that judgment should be entered for him, "upon the ground that the judge misdirected the jury by telling them that there was no evidence which they could take into consideration with a view to reducing the amount of damages claimed, and that he ought to have directed the jury to find whether or not (or to have held that) the plaintiffs had been paid by or had compounded with their servant Hunter, and whether the action was being maintained for his benefit, and should, therefore, have entered judgment for the defendant, or should have directed the jury to take into consideration some or all of the above matters, or should otherwise have had regard to the agreement of August 6, 1889, with a view to the amount of damages which the plaintiffs were entitled to recover."

It was contended for the defendant that Lever and Hunter were joint tortfeasors, and that the agreement of August 6, 1889, amounted to payment or satisfaction by one of them, and, therefore, was an answer to an action against the other. Numerous cases were cited in support of this contention, the correctness of which, indeed, was not disputed. We think, however, that those cases are inapplicable. We are of opinion that the plaintiffs had two separate and distinct rights of action, one against Lever alone, or against Hunter and Lever (for no doubt Hunter might have been made a co-defendant with Lever), and another against Hunter alone.

Their right against Lever was to recover the excess price he had received over the market price, either as damages for the fraud he had committed jointly with Hunter, or, if the excess price had been exactly ascertained before action, as money received for the plaintiffs' use. Their right against Hunter was to recover from him the bribe or commission which had actually been paid, and is based upon the well-known and frequently-enunciated rule that no agent shall make a secret profit for himself in any transaction he conducts for his principal: *Parker* v. *McKenna* (1); *Emma Silver Mining Company* v. *Grant*. (2)

(1) Law Rep. 10 Ch. 96. (2) 11 Ch. D. 918.

It is the latter right which they have compounded for with Hunter, and the arrangements which they have thought fit to make with him cannot, in our opinion, be treated as a payment or satisfaction of the tort which Lever has committed.

In this case the bribe coincided in amount with the excess price. But it might have been more or less, or it might not have been in money at all. In any point of view, it was a gift to the agent which the principal was entitled to have at once handed to him. With reference to that gift, the plaintiffs might, we think, so far as their corporate duty allowed, make what arrangement they pleased with their servant without prejudicing their right to recover from Lever the full excess price paid. It is true that the amount recovered will go in relief of some of the securities deposited by Hunter; but, assuming the plaintiffs have power so to mitigate the loss which would otherwise fall upon their servant, we do not think the defendant can avail himself of that circumstance, either as reducing the amount payable by him for the fraud to which he was a party or as a bar to the action. There has been no payment or satisfaction by Hunter in respect of the cause of action against the defendant, but only in respect of the separate cause of action against himself—an action to which the defendant could not have been a party, although, no doubt, Hunter could have been made a co-defendant in the action against him, in so far as it is an action to recover damages for the fraud which, in concert with Hunter, he had committed.

We, therefore, have come to the conclusion that the learned judge was right in the course which he took at the trial, and dismiss this motion with costs.

VAUGHAN WILLIAMS, J., delivered the following written judgment:—

I have also come to the conclusion that this motion must be refused; but I prefer to state my own reasons for this conclusion. The action is for damages for fraud, and, in the alternative, for money received to the use of the plaintiffs, viz., the sums received by the defendant for the purpose of covering bribes to Hunter, the servant of the corporation, to procure his recommendation of the defendant's tender for the supply of coal to the corporation.

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In my opinion this action sounds in damages, and will not lie in the alternative form for money received. The bribes did not necessarily come out of the pockets of the corporation. The damage sustained by the corporation depends upon how far the price charged to them was in excess of the market or fair and ordinary price of the coal supplied. The bribes might come out of the defendant's profit. I do not think that the plaintiffs can hold to the contract and recover back a portion of the contract price as money received to the use of themselves. It is not like the case where money has by mistake been overpaid under a contract, because then the recovery of the money overpaid is consistent with the contract. In the present case it would be inconsistent. It follows, that, in my opinion, the plaintiffs can only recover damages for having been induced by fraud to enter into a contract in excess of the price which they would have had to pay but for the corruption of their servant. The defence set up in the 6th paragraph of the defence seems to consist of two parts. The first part is accord and satisfaction with Hunter, a co-wrongdoer with the defendant, by payment in full or by payment of a composition. The second part seems to be an allegation of an assignment of the benefit of the action to Hunter. It may be that this defence has not been pleaded according to its proper legal result; but now one has not to plead in that form; the defence now has to set forth the matter of substance relied on, and the matter of substance relied on in this paragraph is that the plaintiffs have entered into an agreement with Hunter which prevents them from successfully suing the defendant Lever. Now, I agree that when a contractor bribes a servant in order that a servant may get for the contractor the master's orders, the master has two distinct causes of action—one against the servant for the profit he has made by the bribes; the other against the contractor and the servant jointly and severally for any loss that the master may have suffered by the joint fraud of the contractor and the servant. I agree further that the master, even though he takes from the servant the bribes which the servant has received from the contractor, is under no obligation to give credit for those bribes in reduction of the damages which the master has suffered by the joint fraud of the contractor and

the servant, unless, indeed, the master knew of the servant taking the bribes and allowed him to do so.

Now, let me consider the effect of the agreement in this case between the master and servant—that is to say, between the corporation and Hunter. It seems to be this: Hunter, the servant, is to deposit with the master 10,000*l.* of securities. This 10,000*l.* may, I think, be taken as the amount of the bribes which Hunter had received from the various contractors, probably including Lever. In consideration of this deposit the master—that is, the corporation—is to bring and continue such actions against the fraudulent contractors at the expense of the servant Hunter, as Hunter may direct, and the proceeds of such actions are to be paid into a bank, and when the amount arrives at 10,000*l.* Hunter, the servant, is to receive back his securities and to receive a full and complete discharge from the corporation: see clause 7. I think that, having regard to the terms of this agreement, this means that Hunter is to be discharged from all claims of the master, as well claims in respect of the bribes as claims in respect of the joint frauds of Hunter and Lever, the servant and the contractor. The question is whether this agreement in any way prevents the master, the corporation, suing Lever, the contractor. If the agreement does afford an answer to the action, it must be, it would seem, on one of the following grounds, viz.: (1.) That it operates as a release of one of two joint tortfeasors; (2.) Because it operates as an agreement by way of composition to the benefit of which all the wrongdoers are entitled; (3.) Because it operates as an assignment of the cause of action to Hunter, and that Lever has a good answer to Hunter as particeps criminis. I do not think that it operates as a release; but I am not very certain of this. The test is whether Hunter could have successfully pleaded the agreement if, after the deposit of the 10,000*l.*, the corporation had brought this action against Hunter and Lever jointly. If Hunter could have so pleaded the agreement, I think that the action against Lever must fail. Now, in my opinion, Hunter could not have successfully pleaded the agreement, but not because the intention of the parties was not such that, as between them, the agreement was intended to operate as a release of Hunter, but because it

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would have been a good replication to such a plea, at all events if pleaded by Lever, that the agreement between the corporation and Hunter was illegal, ultrà vires, and of no effect. I think that the agreement was illegal and ultrà vires, because the corporation had no right to present to Hunter the amount he had received in bribes on account of the corporation, and I further think that an agreement to present an intended witness with moneys proportioned to the effect of his evidence is an immoral agreement and void as against public morality. I have assumed for the purpose of these observations that the effect of the agreement, if operative at all, was to give to the corporation any surplus recovered in the actions beyond 10,000*l.*; but I am by no means clear that the true effect is not that if 10,000*l.* was recovered before December 31, or paid by Hunter to the corporation before that date, the whole proceeds of such actions were not to go into the pocket of Hunter; but if, as I think, this agreement is of no effect or validity, its construction is immaterial. I do not think that the agreement operates, even when 10,000*l.* is paid, by way of payment or composition; for the 10,000*l.* is not paid by Hunter, nor does it come out of his pocket. Nothing, in fact, is given or paid by Hunter to the corporation, who only receive what is their own. I do not think that the agreement operates as an assignment so as to let in defences against Hunter, because I am inclined to think that if the agreement is operative at all the surplus beyond 10,000*l.* belongs to the corporation. I am aware that the illegality of the agreement is not pleaded by the corporation; but this does not prevent the Court from refusing to give effect to an illegal agreement.

*Motion refused.*

Solicitors for plaintiffs: *Trass & Jarmain, for S. Brown, Salford.*

Solicitors for defendant: *Godfrey, Rhodes, Firth & Co., for Godfrey, Rhodes, & Evans, Halifax.*

J. F. C.

[IN THE COURT OF APPEAL.]

1890
*June* 11.

ATKINSON *v.* THE BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY.

*Limitations—Special Contract for Payment of Money—Conditions precedent to Cause of Action—Administrator—Onus of Proof—Statute of Limitations* (21 *Jac.* 1, *c.* 16), *s.* 3.

A. lent money to a building society upon the terms, in writing, that the sum lent should be repayable after the lender had given notice of his intention to withdraw it, and that no money would be paid out by the society, except on production, by the lender personally or by some one with his written authority, of a loan pass-book given to him when the loan was made:—

*Held*, by Lord Esher, M.R., Lindley and Lopes, L.JJ., that the condition as to the production of the book was a condition precedent to the liability of the society to repay the money; so that, until that condition had been complied with, the Statute of Limitations did not begin to run against the lender.

By Lord Esher, M.R., and Lindley, L.J.:—If a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to shew whether he died before or after the moment when the debt became payable, the Statute of Limitations does not run against his administrator until letters of administration have been taken out.

APPEAL from the judgment of Mathew, J., at the trial.

The action was brought by the administrator of Thomas Atkinson, deceased, to recover a sum of money deposited by T. Atkinson with the defendant society by way of loan, and accrued interest thereon.

The defendants pleaded (amongst other things) that the plaintiff's claim was barred by the Statute of Limitations.

The following material facts were proved or admitted at the trial:—On March 21, 1877, Thomas Atkinson deposited with the defendants, a benefit building society, 200*l.* by way of loan, bearing interest at 4 per cent. per annum. The terms upon which the money was advanced were contained in a book called the "Loan Pass-book," given by the defendants' secretary to Thomas Atkinson at the time the deposit was made, and containing an entry, initialled by the secretary, of the loan and the rate of interest, and the following printed conditions: "Loans are received and paid daily at the central office only, 48, Market Street. Twenty pounds may be withdrawn any day, without notice, at intervals of not less than a week. Larger sums are payable on the day after

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the first and second Mondays in the month, and require notice according to terms stated when the notice is given. No money will be paid out except on production of the investor's book, and he must either attend personally or send a written authority. Forms of authority may be obtained at the office." Conditions substantially the same were also printed on the back of a book containing a printed copy of the rules of the society. In December, 1878, Thomas Atkinson gave notice to the defendants of his intention to withdraw his deposit, and was accordingly given by their secretary a form of withdrawal, on which was stated the following terms: "The sum given notice for will be payable on the 14th of January between ten in the morning and five in the evening, or on any subsequent day between ten and five, except on Saturdays, when the office is closed at one. The person in whose name the money is invested must sign his or her name at the foot of this paper, which must be produced with the pass-book, when applying for the money, or it cannot be paid."

Thomas Atkinson died on January 14, 1879, but there was no evidence to shew at what time of the day the death took place. On January 16, 1879, some person unknown called at the defendants' office, and, on producing the loan pass-book and the form of withdrawal which had been given to Thomas Atkinson, fraudulently obtained the amount deposited, with interest up to that date, from the defendants. The form of withdrawal was not signed, and there was no evidence to shew that any member of Thomas Atkinson's family knew that the money was so obtained. On May 3, 1889, the plaintiff obtained letters of administration of Thomas Atkinson's estate, and the writ in this action was issued on May 18, 1889.

Upon the above facts, Mathew, J., gave judgment for the plaintiff for the amount of the loan, and interest up to the date of Thomas Atkinson's death.

The defendants appealed.

*Tindal Atkinson, Q.C.*, and *Lush*, for the defendants. The notice of withdrawal given by Thomas Atkinson having expired on January 14, 1879, the defendants' liability to repay the loan accrued on that day, and the Statute of Limitations then began

to run. The condition in the contract as to the production of the book is not a condition precedent to the defendants' liability to repay the money; it is merely machinery for the purpose of enabling the society to identify a depositor. Where money is deposited in a bank to provide for a current account, the statute begins to run from the moment the bank's liability to pay accrues, notwithstanding that it is part of the bargain that the money should be repaid on presentation of cheques only: *Foley* v. *Hill* (1); *Pott* v. *Clegg*. (2) So, a solicitor must deliver a signed will before he can sue for his costs; nevertheless, it has been held that the statute begins to run from the time the work is done. The same principle should be applied here. If Thomas Atkinson had lived, and had not brought his action until after six years from January 14, 1879, it is contended that his claim would have been barred by the statute. Next, it must be taken that he died after the cause of action accrued. At any rate the onus is upon the plaintiff to shew that the cause of action accrued after the death took place.

*R. Henn Collins, Q.C.* (*Gridley*, with him), for the plaintiff. The cases of *Foley* v. *Hill* (1) and *Pott* v. *Clegg* (2) have no application to this case. Here the right between the parties is only to be ascertained by looking at the special contract they have made. It is conceded by the defendants' counsel that by the terms of that contract, the giving notice of withdrawal and the expiration of the notice are conditions precedent to the depositor's right to be repaid his money. There is no reason why the other terms as to the production of the depositor's book should be eliminated as conditions precedent. It is perfectly competent to the parties to stipulate when the loan shall become repayable; and the case put of a solicitor's bill is not analogous, because there the statute requiring a signed bill to be delivered adds something to the bargain made between the parties. It is submitted that the defendants' liability to repay the money deposited by Thomas Atkinson did not accrue in his lifetime. He therefore died without having any cause of action, and the statute did not run against his administrator until letters of administration were granted.

(1) 1 Ph. 399. (2) 16 M. & W. 321.

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*Tindal Atkinson, Q.C.*, in reply. If the condition as to the production of the book is a condition precedent to the right to sue for repayment of the money, then that condition has not been fulfilled by the administrator, who has brought his action and obtained judgment without having produced the book.

LORD ESHER, M.R. In this case the contract made between the deceased and the society was completed at the moment when the money was deposited with them. It is not disputed that when that was done he received a book and a copy of the rules from them. The book contains the contract between them. It contains the terms, in writing, to which both parties had agreed, and the deceased accepted it as shewing the terms upon which he was to receive back his money. The contract is that the depositor will lend his money to the society on the terms that they shall return it to him when certain stipulations have been fulfilled. Until then the society are under no liability. Those stipulations are that he shall give them notice of his desire to withdraw the money, and that the book shall be produced to the society either by himself, or by someone with his written authority. If that be the contract, there is no liability to pay on the part of the society, and no cause of action arises against them until all those stipulations have been fulfilled. Here it is admitted that they were not fulfilled during the lifetime of the deceased; no cause of action arose, therefore, during his lifetime. It was said that the administrator of his estate did not produce the book when the notice to withdraw the money had expired, and therefore that one of the stipulations never has been fulfilled. But the society had got the book at that time, and have kept it ever since; it therefore was produced. There being no cause of action which the dead man could have maintained, there was no cause of action until the administrator obtained letters of administration, and the claim is not barred by the Statute of Limitations until six years after letters of administration were granted. That ground is sufficient to dispose of this case. It has no analogy to the cases cited where money is deposited in a bank to provide for a current account. The case of money paid in on a deposit account would be very different, and we shall know how to deal

with it when it comes before us. The case put of a solicitor's bill is not like this, because there the contract is to pay for the work when it is done, and the cause of the action arises then, though the statute provides that no action shall be brought until a signed bill has been delivered to the client. It was argued that, although the stipulation for notice of withdrawal of the sum deposited might be a condition precedent to the cause of action arising, the stipulation as to the production of the book was not such a condition. Even if that were so, I think that the defence of the Statute of Limitations fails the defendants. In the absence of authority to the contrary, I think that if a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to shew whether he died before or after the moment when the debt became payable, the statute does not begin to run against the creditor's administrator until letters of administration have been taken out. Upon that ground also I am of opinion that the defence is not made out. This appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. The rights of the parties are governed by the special contract which they have entered into, and the fact that they have entered into a special contract at once distinguishes this case from the cases of *Foley* v. *Hill* (1), and *Pott* v. *Clegg*. (2) In order to decide the questions raised, we must look at all the terms of the special contract. By those terms the depositor is prevented from receiving back his money until certain conditions have been complied with. The conditions printed on the loan pass-book stipulate that, in the case of a larger deposit than 20*l.*, the money may be withdrawn upon the depositor giving notice to the society according to terms stated when the notice is given; and that no money will be paid out except on production of the investor's book, and he must either attend personally or send a written authority. A memorandum of the terms upon which the money might be withdrawn was given to the deceased when he gave notice of withdrawal, and stated as follows: "The sum given notice for will be payable on the 14th of January, between ten in the morning and

(1) 1 Ph. 399. (2) 16 M. & W. 321.

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Lindley, L.J.

five in the evening . . . The person in whose name the money is invested must sign his or her name at the foot of this paper, which must be produced with the pass-book when applying for the money or it cannot be paid." The officer of the society on January 16, unfortunately being under the impression that Thomas Atkinson was applying for the money, paid it to a person who produced the pass-book and the form of withdrawal, unsigned, and who had no authority to receive the money. Looking at all the terms of the contract, I agree with Mathew, J., that the conditions as to the production of the book by the depositor himself, or by some person with his written authority, were conditions precedent to the right to receive back the money. Neither of those conditions was fulfilled in the lifetime of the deceased, and the cause of action, therefore, did not accrue in his lifetime.

But, assuming that counsel for the appellants were right in saying that you could split those conditions, and that the condition as to giving notice of withdrawal was a condition precedent to the cause of action, whilst the condition as to the production of the book was not, the matter then seems to stand thus;—under the contract the sum payable to Thomas Atkinson was payable on January 14, between ten o'clock in the morning and five o'clock in the evening. He died intestate on that day, at what time nobody knows. The point thus raised is new, and, in the absence of authority upon it, I think the true rule is that, if a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to shew whether he died before or after the moment when the debt became payable, the statute does not begin to run against his administrator until letters of administration have been taken out. It was argued that, the deceased having been shewn to be alive upon the day upon which the cause of action accrued, it lies upon the plaintiff to prove that he died before the cause of action accrued. I think that view is far too subtle for practice. The other rule, which I have stated, seems to me much more reasonable and in accordance with law. I am of opinion, therefore, that, from whichever point of view this case is looked at, the defence of the Statute of Limitations fails, and the appeal should be dismissed.

LOPES, L.J. No cause of action arose until the notice of Thomas Atkinson's intention to withdraw his money had been given and had expired, and he, or someone with his written authority, had produced the loan pass-book. If so, it is clear that no cause of action ever accrued to Thomas Atkinson. I am of opinion that those conditions were conditions precedent which prevented the cause of action from arising until they were complied with. If Thomas Atkinson had lived, no cause of action would have accrued until they were complied with. Having died intestate, it is clear law that the statute did not create a bar to the action until six years had elapsed from the grant of letters of administration to the plaintiff. It was said on behalf of the defendants, that, although the giving of the notice of withdrawal, and the expiration of that notice, might be conditions precedent to the liability of the defendants, yet the conditions with respect to the production of the book were not conditions precedent. I cannot take that view. I do not think the conditions can be severed in the way suggested. I desire to rest my judgment solely on this—that those conditions in the special contract made between the parties were conditions precedent to the cause of action accruing; that they were not complied with, and, therefore, that no cause of action ever did accrue to Thomas Atkinson. I express no opinion upon what might, or might not, be the case if they were not conditions precedent. I think that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for defendants: *Yewdall, Son, & Marriott, for Peel, Stamford, & Metcalf, Bradford.*

Solicitor for plaintiff: *E. S. Parker.*

W. A.

1890
*June* 10.

[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN, AND BURGESSES OF THE COUNTY BOROUGH OF SALFORD *v.* THE COUNTY COUNCIL OF LANCASHIRE.

*Local Government—County Council—Transfer of Administrative Business of Quarter Sessions—Transfer of Property of Justices—Debts and Liabilities of Justices—Liability of Council to be Sued—Contagious Diseases (Animals) Acts*, 1869, 1878 (32 & 33 *Vict. c.* 70; 41 & 42 *Vict. c.* 74).

The justices of a county, as the local authority for the county, neglected between the years 1869 and 1878 to recoup to the plaintiffs, as the local authority for a borough within the county, the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county, in carrying out the provisions of the Contagious Diseases (Animals) Act, 1869, which they were bound to repay under s. 97 of that Act. After the passing of the Local Government Act, 1888, the plaintiffs sued the defendants, as successors of the local authority for the county, to recover the sums which should have been recouped:—

*Held*, that the only remedy against the justices would have been by mandamus to them to pay the amounts claimed out of moneys in their hands, or to levy a rate for the purpose; and that, as the Local Government Act, 1888, vests in the County Council the property of the justices for the county subject to the same conditions and restrictions as if the Act had not been passed, the defendants were not liable in the action:

*Held*, also, that if any action would lie it would be an action on the case and not an action for debt on a statute, and therefore the Statute of Limitations was a bar to the claim.

APPEAL from the judgment of Grantham, J.

The action was brought to recover from the defendants a sum of money, the balance of moneys alleged to be payable by the defendants, as successors of the local authority of the county of Lancaster, in recoupment of the proportionate amounts contributed by the plaintiffs, as local authority of the borough of Salford, to the expenses incurred by the local authority of the county under the provisions of the Contagious Diseases (Animals) Acts, 1869 and 1878, in and between the years 1869 and 1888. The claim arose under the following circumstances:—By the Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), sched. 2, the local authority for a county is the justices in general or quarter sessions assembled, and for a borough the mayor, aldermen, and

burgesses, acting by the council, and by s. 97, "Notwithstanding anything in this Act, the local authority of each borough situate within a county, and assessed to the county rate thereof, shall be recouped the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county in pursuance of this Act (including expenditure in compensation for animals slaughtered, or in respect of principal of or interest on money borrowed in pursuance of this Act), so that the burden of those expenses shall be borne wholly by the county, and not as to any part thereof by any borough situate within the county." After the passing of this Act the plaintiffs contributed their yearly quota to the county rate, but they were not recouped the proportionate part mentioned in s. 97. In 1878, the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), was passed, which repealed the Act of 1869, but with the reservation of (inter alia) "any right, title, obligation, or liability accrued" under the former Act. The local authorities in counties and boroughs remained as before, but by s. 37 it was enacted that, "A local authority, not being a body corporate, may sue and be sued, and take and hold land, and otherwise act and be dealt with, for all purposes of this Act, by the name or title of the local authority under this Act for their district, as if they were incorporated." In the year 1888 the Local Government Act of that year (51 & 52 Vict. c. 41) transferred to the council of each county (by s. 3) the administrative business of the justices of the county in quarter sessions assembled, including the execution as local authority of the Acts relating to contagious diseases of animals. After the passing of this Act the plaintiffs demanded of the defendants the aggregate amount of the payments that should have been made to the plaintiffs in each year between 1869 and 1888. The defendants were willing to pay, and did pay, the amount arising since the year 1878. The plaintiffs sued for the balance of their claim and interest; but the claim for interest was abandoned, and the only question in issue was the liability of the defendants to recoup the proportionate amount for the years 1869–1877 inclusive. The defendants denied their liability, and among other defences pleaded the Statute of Limitations.

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The learned judge gave judgment for the defendants.

The plaintiffs appealed.

*Gully, Q.C.*, and *E. Sutton*, in support of the appeal. The judgment for the defendants proceeded on the ground that the only mode of recovering the money claimed was, before the Local Government Act, 1888, by mandamus to the county authority, i.e. the county justices, and that the County Council are in the same position as the justices, and consequently an action will not lie against them to recover these arrears. It is contended for the plaintiffs that under the Act of 1869 the justices were impliedly created a corporation. Sects. 9, 23, 86, 90, and 98 of the Act, require, in order that the Act may be fully carried out, that this implication should be made, and *Conservators of the River Tone* v. *Ash* (1), and *Jefferys* v. *Gurr* (2), shew that the implication ought to be made. The right that is now being contested is to have paid back to the plaintiffs the sums of money that should have been paid to them yearly between 1869 and 1878. This right is in effect reserved by the Act passed in the latter year. If therefore under that Act the justices became, as is submitted, a corporation, the plaintiffs could have sued them, and the right to a mandamus would have ceased. The County Council are in the position of the justices by virtue of s. 3 of the Local Government Act, 1888, and therefore can be sued.

When a statute does not alter duties or rights, but merely gives a fresh remedy for breaches of duty, primâ facie it is to be considered as retrospective, and applicable to past as well as future breaches: *Gardner* v. *Lucas* (3), consequently the obligation to repay these sums remains, though the remedy is now by action, and not by mandamus. Even assuming that after the Act of 1878 no action would have lain against the justices, a remedy by action is given against the County Council by s. 79 of the Local Government Act, 1888, which constitutes them a corporation, and imposes on them the duties and liabilities of the inhabitants of the county. As the liability to pay arises by statute the period of limitation is twenty years, under 3 & 4 Wm. 4, c. 42, s. 3, and this covers the payments now claimed.

(1) 10 B. & C. 349.

(2) 2 B. & Ad. 833.

(3) 3 App. Cas. 582, per Lord Blackburn, at p. 603.

*Henn Collins, Q.C.*, and *Smyly*, for the defendants, were not called on.

LORD ESHER, M.R. I am of opinion that this judgment is correct. The first point is, whether under the Act of 1869 the justices were for the purposes of the Act made a corporation. In support of that view *Jefferys* v. *Gurr* (1) was cited. The question in that case was, whether on reading the statute it could be seen by necessary implication that the legislature intended to make a certain body a corporation for certain purposes. That had not been done in express terms; but unless the implication was made there was no remedy for infringements of the right given by the statute. Here no such ground for making the implication exists, for it is admitted that there was a remedy by mandamus to the justices to discharge their duties under the Act. It is not necessary to consider what the form of the mandamus would have been; but in my opinion, at the very most it could only have been a mandamus to the justices to pay the claim out of funds in their hands applicable to that purpose if they had such funds, or to levy a rate if they had no funds. There would have been no mandamus to the justices simply to pay the claim, for if there was such a liability that would have constituted a debt.

That being the right of the plaintiffs under the statute of 1869, was that right altered by the statute of 1878? Sect. 4 repeals the former Act, but the repeal is not to affect any right, title, obligation, or liability accrued. Would giving a power to sue the magistrates, instead of applying for a mandamus against them, in the form I have indicated, affect a liability or right? To my mind, it would. If there is a right which can only be enforced by a particular remedy, and a much larger and easier remedy is given, I think the right is affected. Then s. 37 says that a local authority, although not a body corporate, may sue and be sued, and take and hold land, and otherwise act and be dealt with, for all the purposes of the Act, by the name of the local authority under the Act for the district, as if they were incorporated. To say, as s. 4 says, that the rights under the former Act are not to be affected, does not make the enforcing of those rights one of

(1) 2 B. & Ad. 833.

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Lord Esher, M.R.

the purposes of this Act; the rights remain under and by virtue of the former Act. It seems to me, therefore, impossible to say that by the Act of 1878 a power to sue the justices was given applicable to the present claim. Nor does the Act of 1888 assist the plaintiffs, for the property vested in the County Council is vested subject to the same restrictions as attached to it in the hands of the justices (1), and therefore if the right to the money had this restriction attached to it, that it could only be enforced by mandamus, that restriction remains, and the 79th section, on which reliance was placed, does not carry the matter further. I think, therefore, that the learned judge was right in saying that with regard to any such liability as is suggested here the County Council cannot be sued. If there is any right against them in respect of matter accrued before they came into existence, I should think it would have to be enforced by mandamus. In the present case, speaking for myself, I would have amended in order that justice might be done had there been no other difficulties in the way than those of the form of the action; but when I see that had the application been for a mandamus there would have been grave difficulties in the way of the plaintiffs, I come to the conclusion that it is not a case in which an amendment could be made, so that whether a mandamus would lie in this case or not is not material.

There is another fatal objection to the claim of the plaintiffs. Supposing that an action could be brought against the County Council to make them liable for the whole of the claim of the plaintiffs, it seems to me that the liability would be to pay out of a particular fund, and that is enforced by action on the case, and not by action for debt on the statute. To such an action the six years' limitation of the Statute of Limitations would apply, and the claim of the plaintiffs would be barred. In any view of this case this action cannot be maintained, and this appeal must be dismissed.

LINDLEY, L.J. This action is brought as an ordinary action for money, and I am not prepared to say that we could properly turn it into anything more than an action for a mandamus. I

(1) 51 & 52 Vict. c. 41, s. 64.

doubt very much whether it is in the power of anyone to change the application into one for a prerogative writ of mandamus. But we need not discuss that; for under the circumstances nothing would be gained by taking such a course.

Looking at the substance of the matter, it appears to me that Grantham, J., has taken the right view of the Acts, which is that the case really depends upon what the rights of the parties were under the Act of 1869. I have satisfied myself, by looking at the Acts of 1878 and 1888, that there is nothing in them that will help the plaintiffs unless they can make out that they had a right of action under the Act of 1869. In order to make that out we have been invited to come to the conclusion that the justices were turned by necessary implication into a corporation capable of suing and being sued under the name of the local authority, and reference has been made to *Conservators of the River Tone* v. *Ash* (1), which is the leading case in which a corporation has been held to have been created by implication. In that case it was decided, that though a body established by Act of Parliament is not created a corporation by express words, the Court is at liberty to treat it as incorporated, if it is necessary to do so in order to give effect to the Act. On looking at the Act in that case, it will be found that it was absolutely impossible according to any principles of English law to give effect to the Act unless the commissioners were held to be incorporated. Under those circumstances it was held that incorporation was the necessary result of the statutory enactment. There is nothing of that sort here. Effect can be given to the statute of 1869 perfectly well without coming to the conclusion that the justices were incorporated. The other case to which reference was made, *Jefferys* v. *Gurr* (2), is simply another illustration of the same principle. If you find that a body not incorporated can discharge all its duties and exercise all its rights without treating it as an incorporated body, you have no right to treat it as incorporated.

Unless these justices are incorporated, there is no simple obligation to pay, enforceable by an ordinary action. It is said that the plaintiffs have a right to this money; this may be true;

(1) 10 B. & C. 349. (2) 2 B. & Ad. 833.

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Lindley, L.J

but their right is not an absolute right in the sense in which a creditor is entitled to be paid by his debtor—but a right under certain circumstances and under certain conditions, and those circumstances and those conditions modify the remedy and affect the right materially. Having looked at the Acts of Parliament, it appears to me that the plaintiffs' only remedy, if any, would be by mandamus, and it is hopeless to have recourse to that now.

Under these circumstances, I think the view taken by the learned judge was right, and the appeal must be dismissed.

LOPES, L.J. I also think the judgment is right.

It is said in the first place that under the Act of 1869 the justices are constituted a corporation. I am of opinion that that is not so. It is perfectly clear that they are not so constituted in express terms, and I think it is equally clear that they are not so constituted by any necessary implication. Therefore, so far as the Act of 1869 is concerned, the only remedy against the justices in a case like this would be by mandamus. What the particular form of that mandamus would be, it is, I think, unnecessary to discuss.

Then the Act of 1878 is relied upon, particularly ss. 4 and 37. Do those sections in any way help the plaintiffs? Sect. 4 repeals the Act of 1869, but it reserves the rights accrued under that Act of 1869, and therefore it reserves the proceeding by mandamus. Sect. 37, it is true, gives a right to sue, but a right sub modo. It is a right to sue for the purposes of that Act—that is, the Act of 1878. The present claim cannot be said to be a purpose of that Act, and therefore in my opinion the Act of 1878 does not assist the plaintiffs.

Then the Act of 1888 is relied upon—particularly s. 79. It is quite true that that section incorporates the County Council, and that s. 64 vests in the County Council all the property of the justices of the county; but that is expressly made subject to the same restrictions as if the Act had not been passed. The effect of that, in my opinion, is to leave the mandamus, as before, the proper remedy in a case like this.

The present proceeding against the defendant is not a pro-

ceeding by mandamus. It has been said that there might be an amendment. Speaking for myself, I should not be prepared to amend in a case like this. But that question scarcely arises, for if this proceeding had been by mandamus the objection would have been taken, and I cannot help thinking successfully taken, that there has been too great delay to enable the plaintiffs to succeed.

There is another difficulty. Assuming for a moment that the council can be sued, I am of opinion that the proper mode of proceeding against them would be by an action on the case, not for debt, as in this claim. If this had been an action on the case, then the Statute of Limitations would have been an answer to any claim arising more than six years before action, and so to the only matter in dispute in this action.

I think, therefore, that the judgment appealed against was right.

*Appeal dismissed.*

Solicitor for plaintiffs: *Samuel Brown, Salford.*

Solicitors for defendants: *Ridsdale & Son, for F. C. Hulton, Salford.*

A. M.

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HUTH, APPELLANT; CLARKE, RESPONDENT.

*June* 16.

*Local Government — County Council — Executive Committee — Delegation of Powers to Sub-Committee—Meaning of Word "Delegation"—Contagious Diseases (Animals) Act,* 1878 (41 & 42 *Vict. c.* 74), *Sched.* 6.

Under Sched. 6, clauses 5 and 6, of the Contagious Diseases (Animals) Act, 1878, a local authority may appoint an executive committee, which is to have all the powers of the local authority, except rating powers, and the executive committee may appoint sub-committees and delegate to them all or any of the powers of the executive committee with or without restrictions, and may from time to time revoke or alter any such delegation.

The duly-appointed executive committee of a county council (which, by virtue of the Local Government Act, 1888, is the local authority for the purpose of the Contagious Diseases (Animals) Acts) made an order delegating to local sub-committees its powers under the Contagious Diseases (Animals) Acts and under certain Orders in Council, including the Rabies Order, 1887. Subsequently to such delegation the executive committee, without expressly revoking the delegation, issued certain regulations under the Rabies Order, 1887, as to

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the muzzling of dogs and keeping them under control; no regulations under the Rabies Order, 1887, had been issued by the local sub-committee:—

*Held*, that the delegation was not equivalent to a resignation by the executive committee of its own powers, that the delegated authority was subject to resumption at any time, and that the regulations were therefore valid.

CASE stated under 42 and 43 Vict. c. 49, s. 33, by the justices of the city of Chichester. The following were the material facts:—

The appellant was charged upon the information of the respondent with permitting a dog to be at large without being effectively muzzled or kept under proper control, in contravention of an order duly made by virtue of the Rabies Order, 1887, by the executive committee appointed by the county council for the administrative county of West Sussex, and was convicted and fined for the offence. The fact that the dog was not muzzled or under proper control was admitted; but it was contended on behalf of the defendant that the order of the executive committee was bad on the ground that such an order could only be made by the sub-committee of the district of Chichester, to which the executive committee had delegated its powers.

By schedule 6 of the Contagious Diseases (Animals) Act, 1878 (41 & 42 Vict. c. 74), the local authority (which by virtue of s. 3 (xiii.) of the Local Government Act, 1888, is now the county council) may appoint an executive committee, which is to have all the powers of the local authority, and the executive committee may appoint a sub-committee or sub-committees and delegate to them all or any of the powers of the executive committee, with or without restrictions, and from time to time revoke or alter any such delegation, and may revoke the appointment of the sub-committee, and appoint another, and may lay down rules for the guidance of a sub-committee. In 1889 the county council for the administrative county of West Sussex appointed an executive committee under the provisions of schedule 6, clause 5, and on October 9, 1889, the executive committee issued an order by which they appointed a number of local sub-committees, and authorized the sub-committees, subject to any direction of the executive committee, to execute the powers and duties which could be delegated to sub-committees of local authorities under

the Contagious Diseases (Animals) Acts, 1878 and 1886, and under certain Orders in Council. Among the Orders in Council, the powers under which were delegated to the sub-committees, was the Rabies Order, 1887, which gives power to local authorities to make regulations for the muzzling of dogs and for keeping them under control. No regulations under the Rabies Order were made by the local sub-committee; but on March 21, 1890, the executive committee made an order under the Contagious Diseases (Animals) Acts, 1878 and 1886 and under the Rabies Order, that no dog should be at large within the district of the local sub-committee, unless it should be effectively muzzled or kept under proper control, which was the order for a breach of which the appellant was summoned.

*Arthur Gill*, (*Avory*, with him) for the appellant. The order made by the executive committee was bad; such an order could only have been made by the sub-committee, to which the executive committee had delegated its powers. Delegation implies a temporary abdication or denudation of power, and the power so delegated cannot be resumed until the delegation has been specifically revoked. Schedule 6 of the Act of 1878 gives power to an executive committee to revoke or alter any delegation; but in the present case the executive committee assumed to exercise the power delegated to the sub-committee without in any way altering or revoking the delegation. By s. 201 of the Public Health Act, 1875, a legislative definition is in effect given of the word "delegation," for the section provides that the committee to which a rural authority has delegated its powers shall be deemed to be the rural authority during the current year of office; this seems to imply that during the current year the delegation could not be revoked nor the power resumed by the local authority. The Privy Council has power under s. 7 of the Contagious Diseases (Animals) Act, 1886, to order that the power to make regulations given to a local authority shall be exercised only by the executive committee, and shall not be delegated to a sub-committee; but in the present case they have not done so.

*Gore*, for the respondent, was not called upon.

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LORD COLERIDGE, C.J. This case raises a point which may reasonably be argued, although I do not feel the smallest hesitation in affirming the conviction. The question is as to the powers of the executive committee of a county council under the Contagious Diseases (Animals) Act, 1878, powers which at the passing of the Act were exercised by the local authority, but which by reason of the provisions of s. 3 of the Local Government Act, 1888, have now been transferred to the county council. We must, therefore, read the Act of Parliament as though it referred to the county council instead of to the local authority. Now, it is perfectly clear that by virtue of the 6th schedule of the Act of 1878 the county council has a right to appoint an executive committee for the purpose of carrying into effect the provisions of the Act, and that the executive committee may in its turn appoint a sub-committee, and delegate to the sub-committee as much of its powers as it chooses to do. In the present case that course has been followed, and the executive committee has delegated to the sub-committee all its powers and duties under certain sections of the Contagious Diseases (Animals) Act, 1878 and 1886, and the Orders in Council relating thereto which can be delegated to sub-committees. Subsequently to this delegation the executive committee made a regulation under the Rabies Order of 1887 as to the muzzling of dogs in this district; the sub-committee had made no regulation, although they had power under the delegation to make one; we, therefore, have a regulation in force in the district made by the proper authority and dealing with a subject-matter with which they were competent to deal. It is suggested, however, that, because there was another authority which might (had it chosen) have violated good sense by making an inconsistent order, the executive committee had no power to make the regulation in question. But delegation does not imply a denudation of power and authority; the 6th schedule of the Act provides that the delegation may be revoked or altered and the powers resumed by the executive committee. The word "delegation" implies that powers are committed to another person or body which are as a rule always subject to resumption by the power delegating, and many examples of this might be given. Unless, therefore, it is controlled by statute, the dele-

gating power can at any time resume its authority. Here the executive committee has exercised the power which the sub-committee might have exercised—but did not—and no question of conflict of jurisdiction arises. I think, therefore, that the justices came to a perfectly right conclusion, and the conviction must be upheld.

WILLS, J. I am of the same opinion. The case really turns on the meaning of the word "delegate," a word which has appeared on the statute-book for the last thirty years, occurring, as it does, at least as far back as 24 & 25 Vict. c. 133, sched., part 2 (6). Delegation, as the word is generally used, does not imply a parting with powers by the person who grants the delegation, but points rather to the conferring of an authority to do things which otherwise that person would have to do himself. The best illustration of the use of the word is afforded by the maxim, Delegatus non potest delegare, as to the meaning of which it is significant that it is dealt with in Broom's Legal Maxims under the law of contracts: it is never used by legal writers, so far as I am aware, as implying that the delegating person parts with his power in such a manner as to denude himself of his rights. If it is correct to use the word in the way in which it is used in the maxim, as generally understood, the word "delegate" means little more than an agent. The notion, therefore, that the use of the word "delegate" implies that the executive committee parted with their own authority is misconceived. The provisions of s. 201 of the Public Health Act, 1875, which have been relied on for the appellant, are in my opinion as much against as for him, although there are certain words in the section which seem to shew that in that particular case the body to which the delegation was made was to be the only authority to exercise the power.

*Judgment for respondent.*

Solicitors for appellant: *Michael Abrahams, Sons, & Co.*

Solicitors for respondent: *Sowton, for Arnold, Cooper, & Tompkins, Chichester.*

W J. B.

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*July* 15.

[IN THE COURT OF APPEAL.]

PINK AND OTHERS *v.* FLEMING.

*Insurance, Marine—Proximate Cause of Loss—"Damage consequent on Collision"—Repairs—Damage to Cargo by delay and handling.*

Goods were insured by a marine policy against (among other things) damage consequent on collision. The ship in which they were shipped came into collision with another ship, and was thereby damaged, so as to render it necessary for her to go into a port for repairs. For the purpose of such repairs it was necessary to discharge a portion of the goods insured. When the repairs were completed, such goods were re-shipped, and the ship proceeded to her destination. On arrival it was found that the goods, being of a perishable nature, had been damaged by the handling necessary for their discharge and re-shipment and by the delay. In an action by the insured upon the policy to recover the amount of the damage to the goods:—

*Held*, that the collision was not the proximate cause of the loss, and therefore the plaintiffs could not recover.

APPEAL from the judgment of Mathew, J., at the trial.

The action was by insured on a policy of marine insurance on goods, which was for the most part in the ordinary form of a Lloyd's policy, but contained the following memorandum: "Warranted free from particular average, unless the ship be stranded, sunk, or burnt, or unless damage be consequent on collision with any other ship." The ship in which the goods insured were shipped, while upon the voyage insured, came into collision with another ship, and thereby sustained damage which rendered it necessary for her to put into a port for repairs. In order that such repairs might be done, it was necessary to discharge a portion of the goods insured, which were oranges and lemons, into lighters, where they remained until the repairs were effected. They were then re-shipped. When the ship arrived at her port of discharge, a portion of the fruit had gone bad. The evidence shewed that the damage had been partly caused by the delay and partly by the handling of the fruit which necessarily took place in the discharging and re-shipment of it for the purposes of the repairs. The learned judge gave judgment for the defendant on the ground that the damage was too remote a consequence of the collision to be within the policy.

*J. G. Witt*, and *J. Hurst*, for the plaintiffs. The damage here was "consequent on collision" within the meaning of the policy. The loss was proximately occasioned by the collision within the meaning of the rule of insurance law on the subject. It was proved that the repairs were necessary in consequence of the collision; that, in order to do them, it was necessary to discharge the fruit; and that the damage was necessarily caused by such discharge and re-shipment of the fruit. There was no voluntary act of any one, or other extraneous cause intervening, so as to break the necessary connection between the collision and the loss. The loss, therefore, resulted from a peril insured against, and the plaintiffs are entitled to recover. [They cited *Ionides* v. *Universal Marine Insurance Co.* (1); *City of Lincoln* (2); *Gabay* v. *Lloyd* (3); *Montoya* v. *London Assurance Co.* (4); *Taylor* v. *Dunbar* (5); Phillips on Marine Insurance, ss. 1098, 1098 (*a*), 1129; *Bondrett* v. *Hentigg.* (6)]

*Myburgh, Q.C.*, and *J. A. Hamilton*, for the defendant, were not called upon.

LORD ESHER, M.R. It is well settled that by the law of England there is a distinction in this respect between cases of marine insurance and those of other liabilities. In cases of marine insurance the liability of the underwriters depends upon the proximate cause of the loss. In the case of an action for damages on an ordinary contract, the defendant may be liable for damage, of which the breach is an efficient cause or causa causans; but in cases of marine insurance only the causa proxima can be regarded. This question can only arise where there is a succession of causes, which must have existed in order to produce the result. Where that is the case, according to the law of marine insurance, the last cause only must be looked to and the others rejected, although the result would not have been produced without them. Here there was such a succession of causes. First, there was the collision. Without that no doubt the loss

(1) 14 C. B. (N.S.) 259; 32 L. J. (C.P.) 170.
(2) 15 P. D. 15.
(3) 3 B. & C. 793.
(4) 6 Ex. 451.
(5) Law Rep. 4 C. P. 206.
(6) Holt, N. P. 149.

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would not have happened. But would such loss have resulted from the collision alone? Is it the natural result of a collision that the ship should be taken to a port for repairs, and that the cargo should be removed for the purposes of the repairs, and that, the cargo being of a kind that must be injured by handling, it should be injured in such removal? A collision might happen without any of these consequences. If it had not been for the repairs, and for the removal of the cargo for the purposes of such repairs, and for the consequent delay and handling of the fruit, the loss would not have happened. The collision may be said to have been a cause, and an effective cause, of the ship's putting into a port and of repairs being necessary. For the purpose of such repairs it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however, which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause can be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do.

For these reasons I think that the judgment of Mathew, J., was right. The case of *Taylor* v. *Dunbar* (1) seems to me to have been decided upon substantially the same view as that which I have endeavoured in somewhat different terms to state, and it appears to me to be really an express authority in favour of our decision. With regard to the American authorities, the American law on the subject seems to differ materially from our law, and therefore it is not necessary to consider them.

LINDLEY, L.J. It appears to me that the judgment of Mathew, J., was correct. It has long been the settled rule of English law with regard to marine insurance that only the causa proxima or immediate cause of the loss must be regarded. The rule is well known, and people must be taken to have contracted

(1) Law Rep. 4 C. P. 206.

on that footing. In principle the case appears to me to be governed by the decision in *Taylor* v. *Dunbar*. (1) The evidence shews that the damage to the fruit was due to the joint operation of the handling and the delay. When the policy is looked at, there are no words applicable to a loss occasioned by these causes.

BOWEN, L.J. I am of the same opinion. Whether we consider the damage occasioned by the delay or that occasioned by the handling of the fruit, the same principle appears to apply. The proximate cause of the loss was not the collision or any peril of the sea. It was the perishable character of the articles combined with the handling in the one case and the delay in the other. The case appears to me to be undistinguishable in principle from *Taylor* v. *Dunbar*. (1) For these reasons, I think the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Courtenay, Croome, Son, & Finch.*
Solicitors for defendant: *Waltons, Johnson, & Bubb.*

E. L.

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[IN THE COURT OF APPEAL.]

*June* 26.

## ANTONY GIBBS & SONS *v.* LA SOCIÉTÉ INDUSTRIELLE ET COMMERCIALE DES MÉTAUX.

*Contract—Conflict of Laws—Foreign Bankruptcy or Liquidation, Discharge by—Lex Loci Contractus—Law of Domicil—Stay of Proceedings—Judicature Act,* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-s.* 5, *s.* 39.

A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled.

APPEAL from the judgment of Stephen, J., at the trial.

The action was for non-acceptance of certain quantities of copper purchased by the defendants, a French company, from the plaintiffs, who were merchants carrying on business in London.

The facts, so far as material, were as follows:—

Contracts for the purchase of copper by the defendants from the plaintiffs had been effected through a broker on the London

(1) Law Rep. 4 C. P. 206.

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Metal Exchange, who in each case drew up and sent to the parties bought and sold notes in the usual way, which were retained by such parties. By these notes the contract was expressed to be subject to the rules and regulations of the London Metal Exchange indorsed thereon; the copper was to be delivered at Liverpool; and payment was to be made in cash in London against warrants. (1) The defendants were a trading company created under and by virtue of certain statutes and articles of association according to the law of France and which carried on business in Paris. It appeared that such company had, since the making of the contracts and before the action, gone into liquidation in France, a judgment of judicial liquidation having been pronounced against it by the Tribunal of Commerce of the Seine. The failure to accept a portion of the copper contracted to be purchased by the defendants had taken place before the judgment of liquidation; but the deliveries of the remainder of the copper did not become due until after such judgment. The defendants gave notice to the plaintiffs that they should not accept such copper, which was therefore not tendered. Notice having been given to the plaintiffs by the liquidator in France that they must come in and prove any claim they had against the defendants or such claim would be barred, and they would be excluded from any share in the distribution of the assets, the plaintiffs thereupon sent in a claim in the liquidation for damages in respect of the loss sustained on resale of the copper. Such claim however contained a reservation of all rights in regard to the action in England which was then pending. The liquidator rejected so much of the claim as concerned the portion of the copper delivery of which was not due until after the judgment of liquidation, on the ground

(1) It has been thought sufficient for the purposes of this report to summarize the effect of the facts with regard to the making of the contracts as above. A question was raised in argument whether they ought to be considered as made in England, and therefore English contracts, or not; but the Court, as will be seen, were clearly of opinion on the facts that the contracts were English contracts. This question turned on the detailed facts of the transactions, which were somewhat more complicated than as above; but it has not been thought that this point involved any question of law such as called for a report.

that no such claim was admissible according to French law. The plaintiffs thereupon commenced proceedings in the French Court to establish their right to claim in the liquidation for the full amount claimed, which proceedings were still pending. Evidence was given by French experts as to the effect of the liquidation proceedings in France according to the French law. It was contended for the defendants, in substance, that the evidence shewed that such proceedings had the effect of dissolving the company for all purposes but liquidation, vesting the entire administration of its assets and affairs for the purposes of the liquidation in the liquidator, and preventing any action from being maintainable against the company; and further, that with regard to the copper of which delivery did not become due until after the judgment of liquidation, the French law was that the vendors might deliver the copper to the liquidator and prove for the price; but as they had not done so, and the copper was not delivered, the contract was cancelled and no claim for damages for non-acceptance was admissible. (1) It was, therefore, contended that either the liquidation proceedings were a defence to the action, or that they formed a ground on which the judge ought to order a stay of proceedings. The learned judge gave judgment for the plaintiffs for the loss sustained on resale in respect of all the copper, including that of which delivery was not due until after the liquidation.

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*Kennedy, Q.C.*, and *H. Tindal Atkinson*, for the defendants. It may be that there was no discharge of the defendants from liability in the technical sense in which the term is used in English bankruptcy law; but the effect of the French law of liquidation is that the company is dissolved for all purposes but liquidation, and no action will lie against it, the administration of all its assets and affairs being vested in the liquidator; and therefore the same question arises substantially as in the case of a discharge of the

(1) The evidence given with regard to the French law of liquidation was lengthy, and its effect not altogether clear; but it has not been thought necessary to go into it in detail, because, as will be seen, the judgment of the Court proceeded on the footing that, even if there were in French law what amounted to a discharge of the defendants from liability, it would not be a defence to the action.

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defendant by the bankruptcy law of a foreign country. This company was domiciled in France, and only existed by French law, and after the judgment of liquidation the company was in French law non-existent for the purpose of being sued. With regard to the breaches of contract subsequent to the liquidation, by the French law the contracts were cancelled and no claim could be made for damages for non-acceptance. Therefore, with respect to those breaches there was what was equivalent to a discharge of liability. The result of the authorities is that, where a debtor is domiciled in a foreign country, and by the bankruptcy or liquidation law of such country the administration of the assets of such debtor is vested in a trustee in bankruptcy or liquidator, and an action against the debtor is rendered not maintainable, the law of England, in accordance with the principles of international law on the subject, recognises and gives effect to the foreign bankruptcy or liquidation; and therefore that the effect of the liquidation in this case is to operate as a bar to the action in England. The English law recognises the title of the trustee or liquidator in the foreign bankruptcy or liquidation, and therefore the creditor is not to have a right to the assets in this country, which ought to go to such trustee in bankruptcy or liquidator abroad, to be administered in the bankruptcy or liquidation there. The plaintiffs here have proved in the French liquidation, and therefore have assented to the jurisdiction of the French court and are bound by the French law. If the liquidation in France is not technically an actual defence to the action, it is submitted that the pendency of that liquidation and of the claim of the plaintiffs under it, affords, at any rate, a ground for staying proceedings in the action under s. 24, sub-s. 5, of the Judicature Act, 1873. Under that section and s. 39, the learned judge at the trial had power to grant, and ought to have granted, a stay of proceedings on that ground before judgment, or at any rate it ought to be granted after judgment, and this Court can grant it now. [They cited *Ellis* v. *McHenry* (1); Story, Conflict of Laws, ss. 340, 342; *Phillips* v. *Allan* (2); *Ex parte Robertson* (3);

(1) Law Rep. 6 C. P. 228. (2) 8 B. & C. 477.
(3) Law Rep. 20 Eq. 733.

*Bartley* v. *Hodges* (1); *Solomons* v. *Ross* (2); *Sill* v. *Worswick* (3); *In re Davidson's Settlement Trusts* (4); *Phosphate Sewage Co.* v. *Lawson & Sons' Trustee* (5); Westlake, Private International Law, ss. 125, 226; *In re Artola Hermanos* (6); *Baldwin* v. *Hale* (7); *Quelin* v. *Moisson* (8); *Quin* v. *Keefe* (9); *Smith* v. *Buchanan* (10); *Lewis* v. *Owen* (11); *Ogden* v. *Saunders* (12); *Edwards* v. *Ronald.* (13)]

*R. T. Reid, Q.C.*, and *R. S. Wright*, for the plaintiffs. The evidence does not shew that the defendants were discharged by the French law. But, if they were, it would be no defence to the action or ground for staying proceedings. These contracts were English contracts, made and to be performed in England. There is no authority to shew that a party to such a contract in England can be discharged by the law of a foreign country, whether the country of his domicil or not. The plaintiffs are not bound by the law of France, and cannot be taken to have contracted with reference to it. The consequences of the proposition for which the defendants contend would be most startling. It would mean that, whenever an Englishman makes a contract in England with a subject of some foreign country, he is liable to have such contract cancelled by the law of such foreign country however unjust or unreasonable, though he could have enforced it in his own country. *Smith* v. *Buchanan* (10) is an authority which is directly to the contrary. The proof sent in by the plaintiffs in the liquidation was conditional only, and reserved all rights in the action. It did not involve any assent to the French law. [They cited Foote, Private International Jurisprudence, p. 381.]

*Kennedy, Q.C.*, in reply.

LORD ESHER, M.R. In this case the defendants, a French company, entered into negotiations for the purchase of copper

(1) 1 B. & S. 375.
(2) 1 H. Bl. 131.
(3) 1 H. Bl. 665.
(4) Law Rep. 15 Eq. 383.
(5) 5 Court Sess. Cas. 4th Series, 1125, 1138.
(6) 24 Q. B. D. 640.
(7) 1 Wallace, 223.
(8) 1 Knapp, P. C. C. 266.
(9) 2 H. Bl. 553.
(10) 1 East, 6.
(11) 4 B. & A. 654.
(12) 12 Wheaton, 213, 366.
(13) 1 Knapp, P. C. C. 259.

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through a London metal-broker, who effected contracts between them and the plaintiffs in England in the ordinary way. He drew up bought and sold notes, by which the contract was expressed to be according to the rules of the London Metal Exchange. One of these notes he sent to the plaintiffs, and the other he sent to the defendants; and both parties retained the notes so sent to them. The contracts were for the purchase of copper to be delivered in England. It appears to me impossible to deny that these were English contracts. The contracts being so made, the defendants became bound to accept the copper contracted to be sold. The plaintiffs were always ready and willing to deliver the copper; but the defendants were not ready to accept, and absolved the plaintiffs from tendering it. Consequently, according to English law, the plaintiffs are entitled to sue the defendants for non-acceptance of the copper, the measure of damages being the difference between the contract and market price at the time of the breaches of contract. But the defendants are a French company domiciled in and governed by the law of France. They have been, by a judgment of the Tribunal of Commerce of the Seine, pronounced to be in judicial liquidation. It was asserted by the defendants by way of defence to the action that the pronouncing of that judgment by the French tribunal by the law of France operated as a discharge of the defendants from liability to an action on the contracts; and it was asserted that it so discharged them in more than one way. It was said that such a judgment dissolved the French company, so that it no longer existed, and so dissolved their liability to be sued on the contracts. It was further said, that the fact of the plaintiffs having by their agents offered proof of their claims before the French tribunal operated as a discharge of the defendants' liability to this action. It was further said, as to part of the claim, that by the law of France, where a company is in liquidation as in the present case, and there is a contract for the acceptance of goods by such company at a date subsequent to the judgment of liquidation, the vendors cannot prove for damages for the non-acceptance; they can elect to deliver the goods to the liquidator and prove for the price; but, if they do not so elect and the goods are not delivered, the effect is that the contract is cancelled and the

purchasers discharged. Such are the contentions set up by the defendants by way of defence. Then they raise a further point. They say that the judgment against the defendants ought not to have been pronounced, but the judge ought to have stayed the proceedings before judgment, or that, on giving judgment, he ought to have stayed further proceedings generally. The plaintiffs contend, that there was no discharge of the defendants from their obligations under the contract, according to the law of France; but they go further, and contend that, assuming that there was such a discharge by reason of the liquidation proceedings, and that such discharge was for this purpose equivalent in France to a discharge in bankruptcy according to English law, yet such discharge would be no answer to an action in England upon an English contract. We have to decide the questions so raised, or such of them as it may be necessary to decide for the purposes of this case. The question really is, whether anything has been proved which is an answer to the plaintiffs' action in this country according to the law of England. It is clear that these were English contracts according to two rules of law; first, because they were made in England; secondly, because they were to be performed in England. The general rule as to the law which governs a contract is that the law of the country, either where the contract is made, or where it is to be so performed that it must be considered to be a contract of that country, is the law which governs such contract; not merely with regard to its construction, but also with regard to all the conditions applicable to it as a contract. I say "applicable to it as a contract" to exclude mere matters of procedure, which do not affect the contract as such, but relate merely to the procedure of the court in which litigation may take place upon the contract. The parties are taken to have agreed that the law of such country shall be the law which is applicable to the contract. Therefore, if there be a bankruptcy law, or any other law of such country, by which a person who would otherwise be liable under the contract would be discharged, and the facts be such as to bring that law into operation, such law would be a law affecting the contract, and would be applicable to it in the country where the action is brought.

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That, at any rate, is the law of England on the subject. So, where a contract is made or is to be performed in a foreign country, so as to be a contract of that country, and there is a bankruptcy law, or the equivalent of a bankruptcy law, of that country, by which, under the circumstances that have occurred, a party to the contract is discharged from liability, he will be discharged from liability in this country. But it is only in virtue of the principle which I have mentioned that such a discharge from a contract takes place. It is now, however, suggested that, where by the law of the country in which the defendants are domiciled the defendants would, under the circumstances which have arisen, be discharged from liability under a contract, although the contract was not made nor to be performed in such country, it ought to be held that they are discharged in this country. It seems to me obvious that such a proposition is not in accordance with the principle which I have stated. The law invoked is not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound. As Lord Kenyon said, in *Smith* v. *Buchanan* (1), it is sought to bind the plaintiffs by a law with which they have nothing to do, and to which they have not given any assent either express or implied. The proposition contended for seems to me to contravene the general principle to which I have alluded as governing these matters, and to suggest a principle for which there is no foundation in law or reason. Why should the plaintiffs be bound by the law of a country to which they do not belong, and by which they have not contracted to be bound? Therefore, if it were true that in any of the modes suggested the defendants were by the law of France discharged from liability, I should say that such law did not bind the plaintiffs, and that they were nevertheless entitled, according to English law, to maintain their action upon an English contract. I should say, too, that, if the contract had been made in any foreign country other than France, the plaintiffs could sue upon it in this country, and their action would not be affected by the law of France. In that case the law of

(1) 1 East, 6.

such other foreign country would govern the contract. That would be the conclusion I should come to, even supposing that the propositions stated by the defendants as to the law of France were in fact made out. It is not necessary, in the view I take, to determine whether they were or not. I must say that I do not think it was clearly made out that, in any of the modes suggested, the defendants were by the law of France discharged from liability. I wish to base my judgment, however, on the assumption that they were so discharged. I say that, assuming that to be so, the suggestion that the defendants would be discharged in this country by a law of the country of their domicil is altogether outside the general principle that governs such matters, and cannot be supported. Is there any authority to that effect? I think that the point has been decided by what Lord Kenyon said in *Smith* v. *Buchanan*. (1) I agree with the observation of Mr. Westlake, who says that Lord Kenyon's view was that the defendant's domicil was immaterial, and I think that he put the case upon the principle that the law of the country of the contract was the law that governed not only the interpretation of the contract, but also all the subsequent conditions by which it was affected as a contract. It has been suggested that, in the case of *Bartley* v. *Hodges* (2), Lord Blackburn has doubted the correctness of this view, and has used expressions indicating that a discharge in the country of the defendant's domicil would be recognised in an English court, although the contract was not made in that country. I do not give much weight to what he said merely during the argument. I agree with the suggestion of the plaintiffs' counsel as to this, viz., that he was criticising the language of the plea which said that the defendant was resident, not that he was domiciled in Victoria. But, when I come to the judgment which he ultimately gave, my view of it is that he meant to accept the view taken by Lord Kenyon, and since adopted by several text-writers on the subject. He said, in giving judgment: "The law on this subject is laid down in Story, Conflict of Laws, s. 342, 5th ed. Having stated in previous sections that the discharge of a contract by the law of the place where it was made or to be performed will be a discharge every-

(1) 1 East, 6. (2) 1 B. & S. 375.

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where, he goes on to say: 'The converse doctrine is equally well established, namely, that a discharge of a contract by the law of a place where the contract was not made or to be performed will not be a discharge of it in any other country. Thus it has been held in England that a discharge of a contract made there under an insolvent Act of the State of Maryland is no bar to suit upon a contract in the Courts of England.' For this he cites *Smith* v. *Buchanan* (1), and proceeds: 'In America the same doctrine has obtained the fullest sanction.' In addition to that, we have the same doctrine pretty distinctly laid down and acted on in *Phillips* v. *Allan*." (2) It seems to me clear that the meaning of what Lord Blackburn so said is, that he accepted the law as laid down by Story, for which the decision of Lord Kenyon in *Smith* v. *Buchanan* (1) was an authority so far as regards this country. With regard to the case of *Edwards* v. *Ronald* (3), the ground of the decision there was, in my opinion, that the Act of Parliament relied upon, being an Act of the English Imperial Parliament, was binding in Calcutta, and, that being so, it was for this purpose the law of the country in which the contract was made and was being sued on. That ground of decision does not apply here. The case of *Quelin* v. *Moisson* (4) was a somewhat peculiar case, and has not much bearing, in my opinion, upon the present case. There the bankrupt had made a promissory note in favour of a French woman in Nantes. He became bankrupt in France, and the payee of the note proved under the bankruptcy. Then, under circumstances which are not clearly stated—but one is inclined to suspect not very honestly on the part of the payee—the note was indorsed over, and immediately indorsed by the indorsee to a person in Jersey. Negotiable instruments, such as notes and bills of exchange, are peculiar instruments, and give rise to several contracts. There is the original contract by the maker of a note or acceptor of a bill with the payee or drawer, as the case may be. Then, if there is an indorsement over, that gives rise to a contract between the maker or acceptor and the indorsee, as well as to a distinct contract between the indorser and indorsee. When the indorsee is

(1) 1 East, 6.
(2) 8 B. & C. 477.
(3) 1 Knapp, P. C. C. 259.
(4) 1 Knapp, P. C. C. 265.

suing the maker of the note or acceptor of the bill, he is suing on the contract made by such maker or acceptor, which will be governed, I should say, by the law of the country to which such contract belongs. Difficulties may, no doubt, arise with regard to cases on negotiable instruments, which do not appear to me to arise in the present case. It seems to me that in this case the plaintiffs were not bound by the French law; and therefore, assuming that the defendants would be discharged by French law, this case must be determined by the law of England. With regard to the suggestion that there ought to be a stay of proceedings, the answer appears to me to be this. If the judgment given by the learned judge was right, I think there is no ground at the present stage why a stay should be granted. If the judgment were wrong, then no stay would be needed. It seems to me unnecessary to go into the question whether the judge at the trial could grant a stay when the case came on before him for trial, and equally unnecessary to go into the question whether, after judgment pronounced, he could stay proceedings generally, or could only stay execution pending an appeal. I see no ground in law on which any such stay ought to be granted. For these reasons I am of opinion that the judgment was right and should be affirmed.

LINDLEY, L.J. The first thing to be borne in mind is that the contracts sued upon are English contracts, made and to be performed in England. The defence set up is in substance, that the defendants are a French company which is being wound up in France. Where such is the case, there is no remedy by the French law against the defendants except in the winding-up proceedings. The question is whether that is a defence to an action brought here. The defendants must be considered as domiciled in France, and I will assume for a moment, though I think it doubtful, that liquidation proceedings are equivalent to bankruptcy. It is contended for the defendants that by reason of the bankruptcy law in France, in which country the defendants are domiciled, the action cannot proceed. Even if the defendants had obtained what was equivalent to a discharge in bankruptcy according to French law, I think that the proposition so contended

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Lindley, L.J.

for is wrong. There is really no authority for it. An ingenious argument was based upon what I think was a misconception of the view taken by Lord Blackburn in *Bartley* v. *Hodges*. (1) He no doubt referred to the fact that the defendant was not stated to be domiciled in Victoria; but, when his actual judgment is considered, I do not think that the inference to be drawn from that must be extended too far. I cannot read the judgment as anything but an adoption by him of what Lord Kenyon said in *Smith* v. *Buchanan*. (2) He said in substance, that the contract was an English contract, and that neither the plaintiff nor defendant was stated to be domiciled in Victoria; but I do not think it is to be inferred because he made use of the latter expression that he meant that, if they had been, the result would have been different. The expressions so used by him with reference to the domicil of the parties have been considered by Mr. Westlake and Mr. Foote, in their books on Private International Law, and they both come to the conclusion that, if he meant to imply what has been suggested, his view is erroneous. But I do not think that he meant anything of the sort. I cannot see any principle upon which it can be said that the domicil of the defendant is in any respect material. The consequences of adopting the doctrine suggested by the defendants appear to me to be so startling that I decline to adopt it.

But then it is said that the proceedings ought to have been stayed before judgment, or, if not, at any rate they ought to be stayed after it. I cannot conceive any reason why they should be stayed before judgment, or why the plaintiffs should not be allowed to ascertain their legal rights on these English contracts by this action. I should think that it would be the most convenient course for both parties that such rights should be so ascertained. As for staying execution after judgment, who ever heard of a judgment debtor asking for a stay of execution, except pending an appeal? But it is said that the liquidator might ask for a stay, and this is practically an application by the liquidator. I see no reason why such an application on behalf of the liquidator should be granted. Execution could only go against the property of the defendants, and to such execution the plaintiffs

(1) 1 B. & S. 375. (2) 1 East, 6.

have a right. If any property not belonging to the defendants is taken, it can be protected by interpleader proceedings. It seems to me doubtful upon the evidence as to the French law whether the property of the company has vested in the liquidator; but in any case no injustice can arise from allowing execution to go. On these grounds I think that the appeal fails.

LOPES, L.J. Assuming that there were what is equivalent to a discharge in bankruptcy in France, of which I am very doubtful, I am of opinion that such discharge cannot operate as a discharge in respect of a contract made in England, though the defendants be domiciled in France. That proposition seems to me to be the result of the judgment of Lord Kenyon in *Smith* v. *Buchanan* (1) and that of Lord Blackburn in *Bartley* v. *Hodges*. (2) As I read Lord Blackburn's judgment in that case, he entirely agreed with the passage from Story which he read, and adopted the judgment of Lord Kenyon in the earlier case. The result of these cases seems to me to be that the question of the defendants' domicil is immaterial. Consequently, there is no answer to this action. With regard to the suggestion that there ought to be a stay of proceedings, all I can say is, that I fail to see any ground whatever for it. For these reasons I think the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for plaintiffs: *Johnson, Budd, & Johnson.*

Solicitors for defendants: *Murray, Hutchins, & Stirling.*

(1) 1 East, 6. (2) 1 B. & S. 375.

E. L.

1890
July 10.

ROBERTS, APPELLANT; WOODWARD, RESPONDENT.

*Weights and Measures—Sale of Coal—Coal in course of Delivery to Purchaser—Representation by Servant of Seller—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 29.

By s. 29, sub-s. 1, of the Weights and Measures Act, 1889, "any inspector of weights and measures, or officer appointed for the purpose by the local authority, may, at all reasonable times, enter any building or other place in which coal is sold or kept or exposed for sale, and may stop any vehicle carrying coal for sale or for delivery to a purchaser, and may test any weights and weighing instruments found in any such place or vehicle, and may weigh any load, sack, or other less quantity of coal, found in any such place or vehicle, or which is in course of delivery to any purchaser." By sub-s. 2: "If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding five pounds":—

*Held*, that in order to convict the seller of coal of an offence under the above section there must be an actual representation by him as to the weight of the coal sold, and that a representation made to an inspector by a servant in charge of a vehicle carrying coal for delivery to a purchaser was not of itself the representation of the master so as to make him liable under the section.

CASE stated under the Summary Jurisdiction Acts by a metropolitan police magistrate.

The respondent was summoned upon a complaint made by the appellant on behalf of the London County Council, the material part of the summons being as follows: "That on April 5, 1890, certain quantities of coal contained in bags in course of delivery to a purchaser were weighed by an officer duly appointed for the purpose by the London County Council and were found to be of less weight than that represented by the seller—that is to say, four bags, each representing a hundredweight, or 112 lbs., contained respectively in weight of coal 74 lbs., 95 lbs., 101 lbs., and 105 lbs., whereby you, the person selling the coal, became liable to the penalty in such case provided by the Weights and Measures Act, 1889 (52 & 53 Vict. c. 21). (1)

(1) By 52 & 53 Vict. c. 21 (the Weights and Measures Act, 1889), s. 29, it is provided that

"(1.) Any inspector of weights and measures, or officer appointed for the purpose by the local authority, may, at all reasonable times, enter any building or part of a building or other

Upon the hearing, the following facts were proved or admitted:—

The respondent was a greengrocer, and in addition to his business as such he supplied coal to his customers. The coal was brought to his premises by his servant in sacks, which were weighed in the presence of the servant, and which the servant alleged were correct in weight. The sacks were then placed on the respondent's premises to be delivered to customers as ordered.

The respondent, having received two orders for coal, one for four hundredweight and the other for one hundredweight, directed his servant Charles Watson to deliver these quantities.

In pursuance of these orders Watson took five sacks of coal, believing that each sack contained a hundredweight, and placed them on the respondent's vehicle for the purpose of delivery.

While on the way to deliver the sacks Watson was stopped by the duly appointed officer of the London County Council, the local authority, who inquired of him what weight the sacks contained, and, upon being told that they contained one hundredweight each, he proceeded to weigh them, with the result that he found them deficient to the amount stated in the summons.

On behalf of the appellant, it was contended—(1) that the respondent was liable, inasmuch as the sacks of coal which were weighed during the course of delivery and found deficient were on his cart and in charge of his servant; (2) that the representation made by the servant to the officer as to the weight of each sack must be taken to be the representation by the master; (3) that when a vehicle containing coal in course of delivery to a purchaser is in charge of a servant and is stopped, and any deficiency is found in the weight of the coal carried, either the

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place in which coal is sold or kept or exposed for sale, and may stop any vehicle carrying coal for sale or for delivery to a purchaser, and may test any weights and weighing instruments found in any such place or vehicle, and may weigh any load, sack, or other less quantity of coal, found in any such place or vehicle, or which is in course of delivery to any purchaser.

"(2.) If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding five pounds."

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master who sells the coal or the servant in charge of the vehicle may be properly summoned.

On behalf of the respondent it was contended—(1) that there were two distinct modes of proceeding contained in the section—one where the coal is weighed at the place of sale, when the person selling or keeping the coal for sale only would be liable, the other when the coal is weighed during the course of delivery, when the person in charge of the vehicle only would be liable, and that the words "as the case may be" were inserted for the purpose of making this distinction clear; (2) that the question of master and servant did not arise.

The magistrate was of opinion that the respondent's contention was correct, and dismissed the summons.

The question for the opinion of the Court was whether, on the facts as stated, the summons was rightly dismissed.

*Meadows White, Q.C.*, for the appellant. The magistrate ought to have convicted the respondent. The Act was passed for the protection of persons purchasing coal in small quantities, and the intention of the legislature was to force the person selling the coal to see that it was of the weight represented. It is sufficient if there be any kind of representation as to the weight, and the coal turns out to be of less weight; the representation need not be made directly by the seller to the purchaser or inspector; the whole transaction may amount to a representation. It is not necessary that there should be any mens rea on the seller's part in order to make him liable. The representation of the servant was in law the representation of the master, so as to make him liable under the section; the master is as liable for his servant's act as he is in the case of a servant selling an indecent book, or in the case of a servant of a licensed victualler supplying drink to a police constable without the master's knowledge.

*Richard Nevill*, for the respondent, was not called on.

POLLOCK, B. I think that the decision of the magistrate was quite right, and that the legislature has not effectually given the remedy which we are told they intended to give. If we look at s. 29, the whole foundation of the legislation there contained is,

that there should be a representation concerning the coal sold; this seems clear from the language of sub-s. 2. There must, therefore, be a representation either verbal or in writing. In the present case there was no verbal representation by the seller as to the weight of the coals, as there usually would be in cases where the coals were sold in the shop or were hawked round the streets for sale; indeed, looking at the facts found in the case, there is no reasonable ground for saying that there was a representation made by the seller to anybody.

It is said, however, that the man in charge of the vehicle, upon being asked as to the weight of the sacks, said that which was untrue, and that the seller, his master, and not the man himself, would be liable in respect of that untrue representation. I cannot assent to that proposition. I know of no instance in which a master is criminally liable for the act of his servant, unless he is made so by statute, or unless the act of the servant is, from its very nature, obviously the act of the master. The instances cited in the argument are inapplicable to this case. In the case of a servant selling an indecent book, it would be presumed to be the act of the master, who was keeping indecent books for sale; and the liability of a master for the act of his servant in supplying drink to a constable on duty arises, not by virtue of an express statutory enactment that he should be liable, but because to permit him under such circumstances to avail himself of a plea that he was ignorant of his servant's acts would be contrary to the whole spirit of legislation on the subject. This appeal must, therefore, be dismissed.

A. L. SMITH, J. I am of the same opinion. We have to determine the true construction of this Act, and then to apply it to the facts of the case. All that happened between the master and servant was that the latter was told by the former to take five sacks of coal and deliver them to the purchaser; while these sacks were in charge of the servant on the master's vehicle on their way to the customers, they were weighed by the inspector and found deficient. It is said that these facts are sufficient to found criminal proceedings under the Act against the master; but I cannot concur in that view. I agree that the

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A. L. Smith, J.

Act was passed to prevent people being defrauded by getting short weight. But who is caught in the meshes of the Act? The basis of the offence created by s. 29 is a representation by the person vending that the coals are of greater weight than is really the fact, and, unless there is such a representation made by the seller, he cannot be made liable. The first sub-section deals with the power to waylay coals (so to speak) while in the shop or in transit; I do not assent to the suggestion that "in course of delivery" is a third case, distinct from being in the shop or in transit; the expression only enlarges the mode of transit, and covers such cases as the carrying small loads of coal to the customer's house on a man's back. Then comes sub-s. 2, which, under the words "represented by the seller," hits the master in the shop; and, under the expression "person in charge of the vehicle," hits the man who is in charge of the vehicle, and who is actually selling the coal from the vehicle. In the present case the servant was not selling the coals, and the master had made no representation that the coals were of greater weight than was in fact the case; and, therefore, neither is liable under the section. It is said that on the facts it appears that the master authorized his servant to make the representation which he did make to the officer; but that does not appear upon the case; all that appears is that the servant was taking the coals to the purchaser, and that he did give an answer to the inspector which turned out to be inaccurate. We are asked to say that the misrepresentation of the servant is, as a matter of law, the misrepresentation of the master; but I cannot agree to that proposition. The instances cited by the appellant's counsel are all peculiar cases, and are cases of the doing of acts as to the doing of which there is an absolute prohibition by statute.

*Judgment for the respondent.*

Solicitor for appellant: *Reginald Ward.*

Solicitor for respondent: *John Godwin.*

W. J. B.

## FENTON *v.* BLYTHE.

1890
*June* 20.

*Bill of Sale—Registration—Non-renewal of Registration within Five Years—Bills of Sale Act,* 1878 (41 *&* 42 *Vict. c.* 31), *s.* 11—*Bills of Sale Act,* 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 3, 8.

The effect of omitting to renew the registration of a bill of sale within five years after its execution, as required by s. 11 of the Bills of Sale Act, 1878, is, since the passing of the Bills of Sale Act, 1882, to make such bill of sale wholly void, even as between grantor and grantee.

APPEAL from the decision of the judge of the Clerkenwell County Court upon the trial of an interpleader issue to try the right to goods taken in execution by the plaintiffs as execution creditors as against the claimant under a bill of sale.

It appeared that on September 27, 1884, a bill of sale over the goods had been granted by the defendants to Collard, the claimant, which bill was duly registered; it was, however, not re-registered within five years, as required by s. 11 of the Bills of Sale Act, 1878. On October 29, 1889, the writ in the present action was issued, and on November 7, 1889, a second bill of sale over the same goods as those comprised in the first bill was made between the parties, and it was under this second bill of sale that the claimant claimed the goods. The learned county court judge held that the first bill of sale, notwithstanding the want of re-registration, was still good as between the grantor and grantee, but held that it was bad upon other grounds, and gave judgment in favour of the claimant. The execution creditors appealed. After the argument for the appellants had commenced, the respondent's counsel abandoned the ruling of the county court judge in his favour, and intimated that he should confine his argument to the point that the first bill of sale was wholly void for want of re-registration.

*Edward Pollock,* for the claimants. The two Acts must be construed together, as enacted by s. 3 of the Act of 1882. By s. 8 of that Act registration under the Act of 1878 is essential to the validity of a bill of sale; in default of it the bill is wholly void. Then by s. 11 of the Act of 1878 the registration must be

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renewed every five years; if it is not, the registration becomes void—that is to say, the bill of sale is the same as if it had never been registered at all, so that under s. 8 of the Act of 1882 it is absolutely void in respect of the personal chattels comprised in it. Therefore on the failure to re-register the first bill of sale the grantor still remained the owner of the goods, and the second bill of sale, under which the claimants make their claim, was good.

*W. J. Noble*, for the execution creditors. The second bill of sale was bad, for the grantor was not the true owner of the goods described in it, the property in them having passed to the grantee under the first bill of sale. By s. 8 of the Bills of Sale Act, 1882, a bill of sale must be registered within seven days after its execution, and if that is not done it is absolutely void; that requirement was complied with in the case of the first bill of sale, which became therefore a valid security. The effect of non-renewal of the registration under s. 11 of the Act of 1878 was to remove the protection against strangers afforded by registration, but the bill still remained good as between the grantor and grantee. When, therefore, the second bill of sale was executed, the property in the goods was in the grantee by virtue of the first bill, and the grantor was not the true owner of the goods over which he was assuming to give a bill of sale, and the second bill of sale, under which the claimants set up their title to the goods, was bad.

LORD COLERIDGE, C.J. The argument on behalf of the appellants is ingenious and very well put; but I cannot assent to it. The true view of the requirements of the statutes seems to be this. By s. 8 of the Act of 1878, registration is made necessary, and, if not registered within seven days, a bill of sale is void, not as between the parties to it, but as against the persons enumerated in that section. Then comes s. 11 of the same Act, which says in effect that if the validity of a bill of sale is to be preserved its registration must be renewed within five years. Now, this bill of sale was granted in 1884, and, therefore, primâ facie, under the Act of 1878, mere non-registration would only make it void as against the persons named in s. 8, and not as

between the parties. But we have to consider not only that Act, but the Act of 1882, which enacts that, so far as is consistent with the tenor of the earlier Act, the two Acts are to be read together and construed as one, and then, by s. 8, provides that if a bill of sale is not duly registered under the principal Act, it shall be void—that is, not merely void as against the person named in s. 8 of the earlier Act, but also as between the parties. Now, it is said that this bill of sale was duly registered under the principal Act, that of 1878, and that s. 11 of that Act only provides that if a bill of sale is not duly re-registered the registration shall be void; that, therefore, as non-registration under that Act would not make the bill void as between the parties, so neither will an omission to renew the registration. That would be a sound argument if there were no provision that the two Acts are to be read together; but there is such a provision, and the Acts cannot be separated from one another. Reading the Acts together, it seems to me that s. 8 of the Act of 1882 requires a bill of sale to be registered under the principal Act within seven days, if it is to be valid at all, and that to be kept valid it must be re-registered as required by s. 11 of the principal Act, and if that is not done the bill of sale becomes wholly void. Here there has been no re-registration under the principal Act, and it follows that the bill of sale was void as against all persons and as between the parties. This seems to me a clear and intelligible line of argument, and to give effect to both the Acts, the real object of the Act of 1882 being, I think, to extend the Act of 1878, and to make bills of sale void as between the parties in many cases where, under the earlier Act, they would only have been void as against strangers.

WILLS, J. I am of the same opinion. The answer to the argument of the appellants seems perfectly plain; it deals with the question as though there were no such thing as the Act of 1882 in existence. Now, s. 11 of the Act of 1878 provides that on failure to renew the registration of a bill of sale, the registration is to become void, and to this provision I can attach only one meaning—that from that time forward the rights of parties are to be regulated as though there had been no registration in

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the first instance, as though no such formality had ever taken place. Under that Act, if a bill of sale was not registered, the effect was to make it bad as against creditors and other persons specified in s. 8, but to leave it good as between the parties to it. But the change made by the Act of 1882 was that it swept away that distinction as to a bill of sale being void as against third persons, but not as between the parties; and in cases where a bill of sale was formerly void only as against third persons, it now became void as between the actual parties to the bill. In the present case the registration of the first bill of sale expired without its being renewed. The bill must, therefore, be treated as though it had never been registered at all, and is void altogether. I cannot assent to the ingenious and subtle argument, that because the bill was duly registered in accordance with the requirements of s. 8 of the Act of 1882, and was, therefore, while registered a good bill of sale, the effect of omitting to renew the registration was merely to make it void as against third persons, and to leave it good as between the parties. Looking at the provisions of the Act of 1882, I cannot draw any distinction between these two classes.

*Appeal dismissed.*

Solicitors for execution creditors: *Geare, Son, & Pease, for Fairburn, Sheffield.*

Solicitors for claimant: *Angell, Imbert-Terry, & Page.*

W. J. B.

[IN THE COURT OF APPEAL.]

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*July* 29.

MILLS *v.* CHARLESWORTH.

*Bill of Sale—Pledge of Goods—Document containing Terms of Pledge—Possession of Pledgee—Bills of Sale Acts*, 1878 (41 & 42 *Vict. c.* 31) *and* 1882 (45 & 46 *Vict. c.* 43).

The owner of goods that had been seized under a fi. fa., agreed with the defendant that the latter should pay out the sheriff, that the goods should be pledged to the defendant as security for his advance, and that the sheriff's officer should hold the goods on behalf of the defendant. This agreement was reduced into writing, and signed by the owner of the goods, and the sheriff acquiesced, and his officer retained the custody of the goods on behalf of the defendant:—

*Held* (by Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting), that the document was not merely a record of the pledge, but was essential to the proof of the defendant's title to possession of the goods, and a bill of sale within the definition in s. 4 of the Bills of Sale Act, 1878.

*Ex parte Hubbard* (17 Q.B.D. 690) distinguished.

APPEAL from the judgment of Day, J., in favour of the plaintiff.

The following statement of the facts of the case is taken from the written judgment of Lindley, L.J.

Wilson was the owner of goods which were seized by the sheriff under a fi. fa. The bailiff in possession was a man named Bristowe. Dickinson was the person who acted for the sheriff, and who gave instructions to Bristowe.

On Friday, December 9, 1887, Wilson applied to Charlesworth, an auctioneer, to pay the sheriff out; and Charlesworth agreed to do so, provided the goods seized were worth the money to be advanced, and provided Charlesworth had possession of the goods. Charlesworth, having satisfied himself of the value of the goods, paid Dickinson the amount claimed by the sheriff, and it was agreed between Wilson, Dickinson, and Charlesworth, that Bristowe should continue in possession for Charlesworth. Dickinson signed and gave Charlesworth a receipt for 62*l.* 15*s.* 1*d.*, and Wilson signed and gave Charlesworth a letter, which was as follows:

"Dec. 9, 1887. Mr. Charlesworth, Auctioneer, Hull.

"Sir,—In consideration of your paying the sheriff's officer the

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amount on Townsend's writ and expenses, viz. 62*l.* 15*s.* 1*d.*, I hereby authorize and request you to hold possession of all my furniture and effects now on the premises No. 2, Pendrill Street, Hull, and to sell the whole by auction as soon as convenient, and after deducting the above amount and your charges, pay over the balance, if any, to me.

"Yours truly, A. P. Wilson."

All this was done at one time, on the evening of Dec. 9. On the 10th, Bristowe, who had been told on the 9th by Charlesworth that he was going to pay the sheriff out, was instructed to remain in possession for Charlesworth, and he did remain in possession accordingly, for some days.

Wilson continued to reside with his family in the house where Bristowe and the goods in his charge were; and, owing to the illness of one of Wilson's children, the goods remained undisturbed for a fortnight or so.

On the 10th, Wilson executed a bill of sale to the plaintiff, who knew nothing of the seizure by the sheriff, nor of the arrangement with Charlesworth, nor of the fact that Bristowe had charge of the goods.

The plaintiff's bill of sale was duly registered, and on Charlesworth discovering its existence, he moved and sold the goods. The plaintiff thereupon brought the present action to recover their value, and Day, J., who tried the case without a jury, decided that the goods passed to the plaintiff under his bill of sale, and gave judgment for him accordingly. From this decision the defendant appealed.

*Henn Collins, Q.C.*, and *Cyril Dodd, Q.C.* (*H. T. Kemp*, with them), in support of the appeal. There was an oral agreement by which the goods passed to the defendant as a pledge. It is not necessary to constitute a pledge that the custody of the goods should be transferred, for the pledgor may continue to hold the goods as agent for the pledgee: *Reeves* v. *Capper*. (1) The document that was drawn up deals with the terms of the possession that had been already passed and is not therefore a bill of sale: *Ex parte Hubbard*. (2) If the defendant were suing for the con-

(1) 5 Bing. N. C. 136. (2) 17 Q. B. D. 690.

version of these goods the facts would justify his claim independently of the document.

*Tindal Atkinson, Q.C.*, and *Arnold Statham, contrà.* The facts of the case bring it within *Ex parte Parsons* (1) and not within *Ex parte Hubbard.* (2) The document expressed the agreement between the parties, and gave the defendant the right to take possession of the goods, and therefore comes within the definition of a bill of sale in s. 4 of the Bills of Sale Act, 1878, as being "a licence to take possession of personal chattels as security for any debt."

*Henn Collins, Q.C.*, in reply.

*Cur. adv. vult.*

1890. July 29. LORD ESHER, M.R. In this case the plaintiff had obtained a bill of sale over certain goods, and the defendant contended that the goods were his already, and that, therefore, the bill of sale took no effect; and the sole question before us was, whether the defendant had really a right to the goods, and whether they had passed to him and were his property when the plaintiff's bill of sale was executed. The goods belonged to one Wilson, and were in the possession of a sheriff's officer under an execution. Wilson desired to get the sheriff out, and applied to the defendant, who was an auctioneer, and they went together to the sheriff's officer who was in possession, by means of his servant who had the actual custody of the goods, and it was then agreed that the defendant should pay out the sheriff, but only on the terms that the sheriff should hold the goods for the defendant. Thereupon the money was paid, and a document was drawn up, which was signed by Wilson. The servant of the sheriff remained as before in the house in possession, and Wilson also remained there, for the sole reason that he had a child ill, and was allowed to stay. The question is, what is the effect of this state of things —was the owner of the goods in possession of them, or was the lender of the money? The possession of the owner Wilson and that of the defendant through the sheriff's officer are antagonistic, and their interests adverse, so that there could not be any joint possession, and I think it plain that Wilson was not in possession,

(1) 16 Q. B. D. 532. (2) 17 Q. B. D. 690.

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Lord Esher, M.R.

but that the sheriff was so on behalf of the defendant; and this I see was treated by the learned judge as a thing that might be taken for granted. We come then to the question, whether the document which was signed at the time the money was lent was a bill of sale within the Bills of Sale Acts. If the transaction was a pledge, *Ex parte Hubbard* (1) shews that the document recording the pledge is not within the Bills of Sale Acts. A pledge, in the ordinary sense of the term, is a case in which money is advanced on goods or chattels which are given into the possession of the person who advances money on them. A bill of sale, in its ordinary meaning, is the document which is given where the legal property in goods passes to the person who lends money on them, but the possession does not pass. But then come the Bills of Sale Acts, with their interpretation clauses, and by s. 4 of the Act of 1878 a document which is a licence to take possession of personal chattels as security for any debt is to be considered a bill of sale, which it is not. But if the document only deals, as in the case of a pawn-ticket, with what is to be done with the pledged goods after the pledge, *Ex parte Hubbard* (1) shews that it is not a bill of sale. Where, however, the document is one which gives a license to take immediate possession of goods as a security for a debt it is a bill of sale. That is the case of *Ex parte Parsons.* (2) These two cases determine the limits of what is or is not a bill of sale, and I think we ought to stand by them. We must apply the rules laid down in those cases to the present one; and I am of opinion that the facts shew that this was not a licence to take possession, but was a document relating to the holding of a possession that had been given. I come, therefore, to the conclusion that this document was not a bill of sale, and that the appeal ought to be allowed.

LINDLEY, L.J., after stating the facts as above, continued:—The main ground of the appeal was that what took place between Wilson, Charlesworth, and Dickinson on the 9th of December amounted to a pledge of the goods by Wilson to Charlesworth, and that this pledge could be proved without having recourse to Wilson's letter of December 9, and that the form of that letter

(1) 17 Q. B. D. 690. (2) 16 Q. B. D. 532.

and the non-registration under the Bills of Sale Act, did not invalidate such pledge. In support of this contention reliance was placed on the decision of this Court in *Ex parte Hubbard.* (1) It is, however, to be observed that in that case there was a physical change of possession of the goods; and the Court held that the pledge there effected could be proved without reference to any written document; and that the pledge so proved was not invalidated by the non-registration of a contemporaneous document, which was viewed by the Court as at most a record of what had taken place, and as regulating the rights of the pledgee under a pledge created and proved by parol.

In this case, however, there was no physical change of possession of the goods. In point of law possession of goods may be changed by agreement without any physical change in their position or in the position of the person who actually guards them. The right to possession may be transferred by agreement, and the character in which the custodian holds them may be changed by attornment. This was established by *Reeves* v. *Capper* (2), *Meyerstein* v. *Barber* (3), and *Hilton* v. *Tucker* (4); and, in my opinion, that which took place on the 9th did amount in point of law to a change of possession of the goods; and that whereas before the agreement for the change Bristowe held for the sheriff, after that agreement Bristowe held for Charlesworth. But the agreement by which this change in possession was effected was reduced into writing, and cannot be proved apart from the writing. Without the writing Charlesworth cannot prove his right to possess as against Wilson, the owner of the goods. This at once makes the letter essential to the proof of Charlesworth's title, and brings the letter within the definition of a bill of sale. The reasoning of the Court in *Newlove* v. *Shrewsbury* (5) is applicable to this case. Charlesworth's title would, I think, have prevailed at common law; but his title is rendered invalid by the Bills of Sale Act.

The expression "to hold" in the letter is appropriate, having regard to the fact that the sheriff had already seized the

(1) 17 Q. B. D. 690.
(2) 5 Bing. N. C. 136.
(3) Law Rep. 2 C. P. 38, 661; Law Rep. 4 H. L. 317.
(4) 39 Ch. D. 669.
(5) 21 Q. B. D. 41.

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Lindley, L.J.

goods, and that no fresh taking was necessary. To hold for the lender is equivalent to giving up possession to the borrower, and retaking for the lender.

If the decision in *Ex parte Hubbard* (1) is extended to cases of pledges created by agreement, and without any physical change in the custody of the goods, the Bills of Sale Act will become of little if any use. Nothing will be easier than to evade it. I cannot construe the Act so as to make it inapplicable to such a transaction as this, or in other words to such an agreement in writing as the Court has to deal with in the present case.

I am therefore of opinion that the appeal ought to be dismissed.

LOPES, L.J. I agree with the judgment of my brother Lindley, which I have had an opportunity of reading, and I have, therefore, only a few words to say. I am of opinion that this case is distinguishable from *Ex parte Hubbard.* (1) As I understand the decision in that case, it was that, where there are goods pledged as security for a loan and delivered to the pledgee, a document that merely records the transaction, and regulates the rights of the pledgee as to the sale and return of the goods, is not a bill of sale. The reason for the decision is that the document is only a record of a transaction which can be proved without reference to it. In this case, in my opinion, the document was an essential part of the transaction, which could not be made out independently of the writing. I think, therefore, that the case I have mentioned is distinguishable, and that the appeal iails.

*Appeal dismissed.*

Solicitors for the plaintiff: *Cotton & Son, for J. H. Green, Hull.*

Solicitors for the defendant: *Pritchard & Sons, for Locking & Holdich, Hull.*

A. M.

(1) 17 Q. B. D. 690.

[IN THE COURT OF APPEAL.]

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*Feb.* 18, 19, 22; *June* 7, 9, 16.

BRISTOL TRAMS AND CARRIAGE COMPANY, LIMITED *v.* MAYOR, ALDERMEN AND CITIZENS OF BRISTOL.

*Tramway—Tramways Act*, 1870 (33 & 34 *Vict. c.* 78), *ss.* 33, 60—*Road Authority—Paving—Difference between Tramway Company and Road Authority—Reference to Referee appointed by the Board of Trade.*

A municipal corporation, as being the road and local authority, proposed to alter a road within their district, upon which a tramway had been constructed by a tramway company under the Tramways Act, 1870, by taking up the existing granite pavement and laying down a wood pavement over the whole of the roadway, including the space between the rails of the tramway and eighteen inches on each side thereof.

The tramway company objected to the alteration, so far as it concerned the last-mentioned portion of the roadway, and claimed to refer the matter as being a difference within s. 33 of the Tramways Act, 1870, to a referee to be appointed by the Board of Trade:—

*Held*, that the difference was not one within the 33rd section, inasmuch as it was not with respect to any interference or control claimed to be exercised by the road authority "by virtue of the Act" or to "any subject or thing regulated by or comprised in the Act," but with respect to the exercise of a power which belonged to the road authority independently of the Act, and which was preserved by s. 60 of the Act.

APPLICATION for an injunction referred to the Court by a Judge at Chambers.

The facts were as follows:—The plaintiffs, a tramway company, who had laid down certain tramways in Bristol by virtue of a provisional order confirmed by Act of Parliament under the Tramways Act, 1870 (33 & 34 Vict. c. 78), claimed an injunction to restrain the defendants, who were both local authority and road authority of the district within the meaning of that Act, from removing or interfering with the plaintiffs' tramway in two streets in Bristol, or the pavement or roadways contiguous thereto so far as maintainable by the plaintiffs. It appeared that the streets in question were paved with granite setts, and the defendants, as the road authority, proposed to take up such granite setts and to lay down wood pavement over the whole roadway, including the space between the rails of the tramway and eighteen inches on each side thereof. The plaintiffs objected to this being done as far as the last-mentioned portion of the road was con-

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cerned, on the grounds that it would throw increased expense upon them in maintaining and repairing that portion of the road, which they were bound to maintain and repair under s. 28 of the Tramways Act, and that the wood pavement would be more slippery than the granite setts, and, the gradient being steep, it would be necessary to employ more horses to drag the trams uphill. The defendants, notwithstanding such objection of the plaintiffs, still proposing to lay down wood pavement as before mentioned, the plaintiffs applied for the appointment of a referee by the Board of Trade under s. 33 of the Tramways Act, 1870, on the ground that a difference within that section had arisen between themselves and the defendants; and they brought the action for an injunction to prevent the defendants from proceeding to carry out their intention until the decision of such referee had been given. The Board of Trade postponed dealing with the plaintiffs' application to them, pending the proceedings for an injunction.

The plaintiffs applied to a Judge at Chambers for an interim injunction pending the trial of the action. Upon the hearing of the application it was arranged that it should be referred to the Court, and the hearing of it should be taken as the trial of the action. (1)

*Rigby, Q.C.*, and *R. S. Wright*, for the plaintiffs.
*Philbrick, Q.C.*, and *H. Sutton*, for the defendants.

*Cur. adv. vult.*

(1) The Tramways Act, 1870, s. 33: "If any difference arises between the promoters or lessees on the one hand, and any local authority, or road authority, or any gas or water company, or any company, body, or person to whom any sewer, drain, tube, wires, or apparatus for telegraphic or other purposes, may belong, or any other company on the other hand, with respect to any interference or control exercised, or claimed to be exercised, by them or him, or on their or his behalf, or by the promoters or lessees by virtue of this Act, in relation to any tramway or work, or in relation to any work or proceeding of the local authority, road authority, body, company, or person, or with respect to the propriety of, or the mode of execution of any work relating to any tramway, or with respect to the amount of any compensation to be made by or to the promoters or lessees, or on the question whether any work is such as ought reasonably to satisfy the local authority, road authority, body, company, or person concerned, or with respect to any other subject or thing regulated by or

Feb. 22. The following judgments were delivered:— 1890

BRISTOL TRAMS AND CARRIAGE CO. v. MAYOR, &c., OF BRISTOL.

VAUGHAN WILLIAMS, J. In my opinion the tramway company are not entitled to the injunction for which they ask. This is not a case in which the corporation are seeking to enforce against the tramway company any statutory obligation imposed on the tramway company. At one time the corporation required the tramway company, at their own expense, to lay down that part of the roadway between the rails and for 18 in. on each side of the outer rail of each tramway with wood pavement in substitution for granite setts, and had this state of things continued the question arising on this motion might have been very different from what it in fact now is. It appears, however, that the corporation withdrew this requisition, and now merely propose to lay down the whole roadway, including that part over which the tram lines run, with wood pavement, to be laid at the expense of the corporation, and the corporation have given notice to the tramway company of their intention, which includes, of necessity, the taking up by the corporation of the tram lines for the purpose of laying down the wood pavement. (1) The tramway company ask for an injunction to restrain the corporation from so doing; and the question which is raised in this case is whether the corporation have any lawful authority to remove the said tram lines for the purposes and under the circumstances which I have mentioned. Now it seems to me that the general purview of the rights of the tramway company is that the tramway company have, under the General Tramways Act, 1870, and the special Act embodying the provisional order of the Bristol Tramways Company, a right of user of the public highway and a right to lay down their metals on the public highway, and certain other

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comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference shall be borne and paid as the referee directs."

Sect. 60: "Nothing in this Act shall take away or affect any power which any road authority . . . may have by law to widen, alter, divert, or improve any road. . . ."

(1) It appeared in the Court of Appeal that the defendants did not threaten or propose to remove or interfere with the rails of the tramway, or the substructure on which they rested.

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Williams, J.

subsidiary rights specified by the Act and order, but that these rights of the tramway company in no way abridge or take away the powers of the local authority to break up any road along which the tramway is laid, or any other power vested in the local authority. And it seems to me that, apart from the Tramways Acts, the local authority, as the urban sanitary authority, and as such the surveyors of highways, and, moreover, as having vested in them by the 149th section of the Public Health Act, 1875, all streets repairable by the inhabitants at large, have the right to break up the highway and pave it in such manner as they may think fit. Indeed, I do not understand the tramway company to contend that the corporation have not this power, independently of the Tramways Acts, or that this power is taken away from the corporation as the local authority by any provision in those Acts, but it is said, that, although this power is not taken away, yet it can only be exercised sub modo, can only be exercised subject to the provision contained in the 33rd section of the Tramways Act, 1870, for reference to a referee nominated by the Board of Trade of any difference arising between the tramway company and the local authority; and it is said that a difference has arisen on the question whether it is reasonable that the corporation should substitute wood paving for granite setts in that part of the roadway occupied by the tram lines. Now, if this question is one which can be referred under the provisions of s. 33, I agree that the injunction asked for ought to be granted and that the corporation ought to be restrained from meddling with the tram lines until this question has been determined by a statutory reference. *Reg.* v. *Croydon and Norwood Tramways Co.* (1) seems a clear authority to this effect. But it is plain that the applicability of this case depends on whether the difference between the corporation and the Bristol Tramway Company is a difference covered by the 33rd section. In *Reg.* v. *Croydon and Norwood Tramways Co.* (1) the Corporation of Croydon were seeking to enforce against the tramway company a statutory obligation, and the difference there plainly fell within the words of the 33rd section, for the corporation were seeking to exercise statutory control over the tramway company in relation to work of the tramway

(1) 18 Q. B. D. 39.

company, and there was a question whether such work was such as ought reasonably to satisfy the local authority. But in the present case the difference has arisen in respect of work proposed to be executed by the corporation, not under powers conferred on them by the Tramways Acts, but in the exercise of powers and the performance of duties vested in and imposed on the corporation as the surveyors of highways and as the urban sanitary authority under the Public Health Act, 1875. Now, I have looked carefully through the 33rd section of the Tramways Act, 1870, and I cannot find that the difference between the corporation and the tramway company falls within any of the heads enumerated in that section. The difference does not appear to be in respect of control exercised, or claimed to be exercised, by virtue of this Act by the promoters or lessees in relation to work of the local authority, or by the local authority in relation to any tramway or work. For I read this heading as dealing merely with interference or control, exercised, or claimed to be exercised, by virtue of the Tramways Act, 1870. Nor does the difference seem to be with respect to the propriety of or mode of execution of any work relating to a tramway; nor with respect to the amount of compensation to be made by or to the promoters; nor does the difference arise on the question whether any work is such as ought reasonably to satisfy the local authority; nor does the difference arise with respect to any other subject or thing regulated by or comprised in this Act. Moreover, I would observe that this last heading seems itself to shew that it is matters regulated by or comprised in this Act which alone are intended to be the subject of a reference under this section. This seems to me to be the natural meaning of the words, and, if there is any doubt, I for my part should much hesitate to put a construction upon the Tramways Act, 1870, which would give to the tramway company every time that they thought that works proposed to be executed by the local authority as surveyors of highways would increase the burden on the company of repairing that part of the road adjacent to the tram lines, or every time that the tramway company thought that the work of the local authority would inconvenience the tramway company, the right

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Williams, J.

of having the question of the reasonableness of the proposed work submitted to arbitration. It seems to me much more reasonable to suppose that the legislature intended to leave such questions to the determination of the local authority, trusting the local authority not to spend the public money in altering or improving the streets unreasonably; and that the legislature only intended to make the subject of reference questions arising where the local authority, by virtue of the statute, called upon the tramway company to execute works or to execute works in the particular manner at the expense of the tramway company. I may add that it seems to me that the 57th and 60th sections of the Tramways Act, 1870, go far to bear out the view which I have indicated.

DENMAN, J. In this case the plaintiffs, the Bristol Tramways Company, had applied to Day, J., at chambers, for an injunction to restrain the defendants, the Corporation of Bristol, who are both the "local authority" and the "road authority" within the meaning of the Tramways Act, 1870 (33 & 34 Vict. c. 78), from removing or interfering with the plaintiffs' tramways in two streets in Bristol in which the plaintiffs have tramways, so far as maintainable by the plaintiffs, until further order. The learned judge adjourned the summons into Court, and the parties have consented that the hearing is to be taken as the trial of the action, the injunction being continued in the meantime.

The facts are not in dispute, and are as follows:—The plaintiff company are authorized by the Tramways Orders Confirmation Act, 1889, "to construct certain tramways in Stokes Croft and North Street, Bristol," in respect of which the present question arises. The order upon which the plaintiffs' powers depend is contained in the schedule to that Act, and the provisions of the Tramways Act, 1870, by s. 1 of the order are incorporated with the order except where expressly varied by the order.

The plaintiffs having obtained their powers, constructed the tramway in question in accordance with plans deposited as required by clause 6 of the order.

These plans shewed on the face of them the exact mode in which the tramways in question were laid down and existed

down to the time when the question arose as to the right of the defendants to do that which is now sought to be restrained by injunction.

This mode of construction consisted of paving with granite setts so much of the road as lies between the rails of the tramway and as extends eighteen inches on each side of the tramway outside the rails. This mode of paving was adopted by agreement with and under the supervision of the defendants, and continued to be used by and repaired by the plaintiffs down to the present time in the same state. In April, 1889, the defendants gave notice to the plaintiffs that they had decided to pave the whole of the Stokes Croft and North Street with wood, and that the plaintiffs would have to arrange for so paving that part of the street which they had to maintain. In July the defendants gave notice of their own intention to do the work, which it is stated they now desire to do at their own expense in the first instance, but declining to undertake to pay the extra expense of repair and maintenance, which the plaintiffs' affidavits state will be very largely increased to the detriment of the plaintiffs. A correspondence ensued in which the plaintiffs denied the right of the defendants to interfere with them in their duty and obligation to maintain the said roadways by substituting a pavement more costly to maintain, and, as they contend, unsuitable for horses working on a tramway; and upon the defendants reiterating their intention of proceeding, the plaintiffs took steps to obtain the nomination of a referee by the Board of Trade, under s. 33 of the Tramways Act, 1870, which application is not yet disposed of by the Board of Trade, but postponed until this application is disposed of. In the meantime the defendants have recently given formal notice to the plaintiffs that they have arranged for the work of relaying the streets (including the part within the rails and eighteen inches outside) with wood. The plaintiffs contend that a difference has thus arisen which they have a right to have referred to be settled by an engineer or other fit person to be nominated by the Board of Trade, within the provisions of s. 33 of the Tramways Act, 1870. This the defendants dispute, contending that, as road authority, they have an absolute right to pave or to have paved the whole of the

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street with such materials as they think most suitable. Before expressing an opinion on the matter, it will be well to call attention to those provisions of the order of 1879 and the Act of 1870, which seem to bear upon the question raised. By s. 4 of the Tramways Act, 1870, it is provided that provisional orders authorizing the construction of tramways may be obtained from the Board of Trade by any company with the consent of the local or road authority (in both of which capacities the defendants act)—such company being in the Act referred to as "the promoters." In several following sections of the Act are contained the powers given to the Board of Trade to make provisional orders, which are by s. 8 to contain "such provisions as (subject to the requirements of this Act) the Board of Trade, according to the nature of the application and the facts and circumstances of each case, think fit to submit to Parliament for confirmation." By s. 22 the Act is to apply to and be incorporated with every provisional order or Act of Parliament authorizing a tramway, and all its provisions, except so far as expressly varied or excepted by any such order or Act, are to form part of such provisional order or Act and to be construed therewith. By s. 25 every tramway is to be laid and maintained in such manner that the uppermost surface of the rail shall be on a level with the surface of the road. By s. 26 the promoters may open and break up any road, subject (1) to giving seven days' notice to the road authority; (2) to not opening or breaking up or altering the level of any road except under the superintendence and to the reasonable satisfaction of the road authority. By s. 27, when the promoters have opened or broken up any portion of any road, they are within a certain time to make good the surface and to the satisfaction of the road authority restore the portion of the road to as good condition as that in which it was before it was opened or broken up. By s. 28 it is enacted:—The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway is laid as lies between the rails, and so much as extends eighteen inches beyond the rails on each side of the tramway.

"Provided always, that, if the promoters fail to comply with the provisions of this section, the road authority, if they think fit, may themselves at any time after seven days' notice to the promoters, open and break up the road and do the works necessary for the repair and maintenance of the road to the extent in this section above-mentioned, and the expense incurred by the road authority in so doing shall be repaid to them by the promoters." By s. 32, "Nothing in this Act shall take away or abridge any power to open or break up any road along which any tramway is laid, or any power vested in any local authority or road authority for any of the purposes for which such authority is respectively constituted; but in the exercise of such power every such local authority or road authority shall be subject to the following restrictions:—(1) They shall cause as little detriment or inconvenience to the promoters as circumstances admit"; (2) requires a notice before commencing any work whereby the traffic on the tramway will be interrupted; (3) "they shall not be liable to pay to the promoters any compensation for injury done to the tramway by the execution of such work or for the reasonable exercise of the powers so vested in them as aforesaid"; (4) when, to enable them to execute such work, the road authority requires it, the promoters are to stop traffic where it would interfere with the work or shore up at their own cost, provided such work shall always be completed by the road authority with all reasonable expedition. Then follows clause 33, upon which the plaintiffs rely as entitling them to have the question decided whether they are bound to submit to a conversion of that part of the road which they are liable to repair at the will and discretion of the road authority, or whether they have a right, before any such change is made, to have that question submitted to a referee nominated by the Board of Trade.

Sect. 33 is as follows, omitting only such words as are immaterial to the question before us: "If any difference arises between the promoters or lessees on the one hand and any local authority or road authority . . . on the other hand, with respect to any interference or control exercised, or claimed to be exercised, by them . . . or on their . . . behalf, or by the promoters or lessees by virtue of this Act, in relation to any tramway, or work,

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or in relation to any work or proceeding of the local authority, road authority, body, company, or person, or with respect to the propriety of or the mode of execution of any work relating to any tramway, or with respect to the amount of any compensation to be made by or to the promoters or lessees, or on the question whether any work is such as ought reasonably to satisfy the local authority, road authority, body, company, or person concerned, or with respect to any other subject or thing regulated by or comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act), be settled by an engineer, or other fit person nominated as referee by the Board of Trade on the application of either party." Mr. Rigby, in his able argument before us, relied mainly upon the case of *Reg.* v. *Croydon and Norwood Tramways Co.* (1) In that case the special Acts of 1878 and 1883 provided "that the whole space between the rails, &c., should be paved by the company to the satisfaction of the council with wood or other paving to be approved of by the council," and should at all times be kept in good repair by the company.

The facts of that case, as stated in the report, were as follows:—

By an arrangement between the tramway company and the local board of health for the district of Croydon (before the incorporation of the borough) some parts of the line of rails of the tramway were laid with granite macadam on either side and in the spaces between the two lines. The company, alleging that this was dangerous, applied to the corporation for permission to lay down granite setts, which was refused. The company thereupon executed the work without having obtained the approval of the council. The corporation applied for and obtained a rule nisi for a mandamus commanding the company to take up the granite setts in the specified places and to relay the same with macadam, or other paving to be approved by the corporation. On argument this rule was discharged by a Divisional Court (Lord Coleridge, C.J., and Fry, L.J.), on the ground that the corporation had not exercised their discretion in considering the application made to them; and, further, that a difference had arisen within the meaning of the Tramways Act, 1870 (33 & 34

(1) 18 Q. B. D. 39.

Vict. c. 78), s. 33, which should be settled by a referee nominated by the Board of Trade. (1) For the corporation, in support of the appeal, it was argued that the company had no power to use any other paving than wood without the approval of the corporation, and that s. 33 of the Act of 1870 did not apply. For the company it was contended that the case was within s. 33, and a referee ought to be appointed. The Court of Appeal decided in favour of the tramways company, and dismissed the appeal, and Lopes, L.J., gave his reasons as follows: "I think the difference which has arisen in this case is a difference which is expressly contemplated by the words in s. 33 of the Tramways Act, 1870, 'or on the question whether any work is such as ought reasonably to satisfy the local authority.' It appears to me that those words were introduced for the purpose of meeting such a case as this. They were introduced for the purpose of preventing any unreasonable or despotic action on the part of the local authority." (2)

I can see no practical distinction between the provision relied upon by the corporation in that case and s. 28 of the Act of 1870; the words "shall be paved by the company to the satisfaction of the council with wood or other paving to be approved by the council, and at all times be kept in good repair by the company," seem to me to be identical, in effect, with the words in s. 28, "The promoters shall at all times maintain and keep in good condition, and repair with such materials as the road authority shall direct, and to their satisfaction." That case was certainly decided on the ground that a dispute as to the right of the corporation to order the company to restore "granite macadam," the company having chosen without the corporation's approval to substitute "granite setts," could not be decided upon mandamus, but was a difference falling within s. 33 as being a difference "with respect to an exercise of control," and also as a difference on the question "whether any work is such as ought reasonably to satisfy the authority." Two sections of the Act not yet referred to were strongly relied upon as reasons for not holding that case to be an authority applicable to the present. One was s. 57, which provides that "Notwithstanding anything in this Act contained the promoters of any tramway shall not

(1) 18 Q. B. D. at p. 40. (2) 18 Q. B. D. at p. 43.

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acquire, or be deemed to acquire, any right other than that of user of any road along or across which they lay any tramway." The other was s. 60, which provides that "Nothing in the Act shall take away *or affect* any power which any road authority may have by law to improve any road." I think that these sections do not go far enough to prevent the application of the case of *Reg.* v. *Croydon and Norwood Tramways Co.* (1) to the facts of the present case. I think it is impossible to hold that the defendants in the present case could, at their mere will and pleasure, order the plaintiffs, without any sanction of the Board of Trade, from time to time to submit to have the roadway on which their horses must run to work their traffic changed without any reference to the question whether the status quo of that part of the road is such "as that they ought reasonably to be satisfied with it." I think that in s. 57 the words "road along or across which they lay any tramway" must necessarily be construed so as to exclude that part of the road on which the tram lines are laid and the tram horses work, over which the promoters certainly have *some* right—viz., the right of repair. Nor do I think that s. 60 is intended of itself to give or reserve to the road authority an absolute power at their own pleasure to prescribe a relaying of the tramway road with different materials, without reference to the question whether they ought to be reasonably satisfied with the work on *that* part of the road as it is. I think that the legislature intended that questions such as those raised in this case should be decided by a referee appointed by the Board of Trade. I abstain from giving any opinion as to the possibility of having a good road partly of wood and partly of granite setts. This appears to me to be just the sort of question which the legislature may have reasonably contemplated as likely to arise when it enacted s. 33, and therefore provided for a decision by such a reference as that prescribed. It was suggested that s. 33 only applied to disputes about things actually done; but I think that it clearly covers a dispute such as that which has arisen in this case under the words "control exercised, or claimed to be exercised"; and this objection, moreover, does not apply to the case so far as it is (and I think it is) a

(1) 18 Q. B. D. 39.

difference "on the question whether the work is such as ought reasonably to satisfy" the defendants. I think also that it is a "difference with respect to a subject regulated by or comprised in the Act"—viz., whether the defendants have an absolute power to alter the materials of that part of the road which the plaintiffs are liable to repair and maintain without the sanction of the Board of Trade. I think this case is practically decided by the case of *Reg.* v. *Croydon and Norwood Tramways Co.* (1), and that we ought to grant the injunction prayed for. I need hardly say that I give this opinion with great diffidence after considering the opinion just read by my learned brother Vaughan Williams, but I think that the road authority, notwithstanding the strong words of the Act of 1875, must be taken to hold these powers, subject to the provisions of the Tramways Act, 1870, only so far as they are consistent with such provisions, and that there is no inconsistency in so construing the provisions of the Act of 1875 as not to conflict with the rights and duties of the tramway company conferred and imposed by the Act of 1870 and the Provisional Orders and Acts made and passed in pursuance of that Act.

The Court being equally divided in opinion, Vaughan Williams, J., withdrew his judgment, and the order was made for an injunction.

*Order for injunction granted.*

P. B. H.

The defendants appealed.

*Philbrick, Q.C.*, and *H. Sutton*, for the defendants. The defendants are not proposing to remove or in any way to interfere with the tramway rails, or exercising any power under the Tramways Act. They are proposing to exercise their power as road and local authority under the Public Health Act, 1875, s. 149, by improving the road. Sect. 60 of the Tramways Act, 1870, absolutely preserves the power of the road authority to alter or improve the roads. The provisions of s. 33 do not apply to the exercise by the road authority of powers of interference with and control over the roads which they have independently of the

(1) 18 Q. B. D. 39.

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Tramways Act; and that section does not in any way qualify the provisions of s. 60. Sect. 33 only applies to matters arising under the provisions of the Act. It applies to differences arising with respect to any interference or control claimed to be exercised "by virtue of the Act" in relation to the tramway or work relating thereto, and the other matters specified, and "with respect to any other subject or thing regulated by or comprised in the Act." The power which the defendants claim to exercise is not "by virtue of the Act," nor is the matter one "regulated by or comprised in the Act." The defendants are proceeding by virtue of their power as road authority under the 149th section of the Public Health Act, 1875, which is preserved by s. 60.

*Rigby, Q.C.*, and *R. S. Wright*, for the plaintiffs. The terms of s. 33 include the present case. The construction of that section is not limited as suggested for the defendants. The words "by virtue of the Act" in the section must be read in connection with the words "promoters or lessees," and not with the rest of the sentence. This is a difference between the promoters on the one hand and the road authority on the other, with respect to an interference or control claimed to be exercised by the road authority in relation to a tramway or work, or with respect to an interference or control claimed to be exercised by the promoters in relation to a work or proceeding of the road authority, or on the question whether a work is such as ought reasonably to satisfy the road authority. The word "tramway" for the purposes of this section is not confined to the rails themselves, but includes the portion of the road between the rails and on each side, which the tramway company are bound to maintain. The defendants, therefore, do propose to interfere with part of the tramway—i.e., the roadway where the tram horses run. It is reasonable to suppose that, the tramway company being given rights and powers, and incurring expenditure on the faith of such rights and powers, with relation to a road over which the road authority, as representing the public, also have rights and powers, in view of possible conflicts, provision would be made by the legislature for determining what is reasonable as between the two with regard to the construction of the portion of the

road on which the tramway runs. It is contended that s. 33 makes such provision. It could never have been intended to leave a tramway company entirely at the mercy of the road authority as suggested. The construction contended for by the defendants, which would confine the operation of the section to cases where the interference with the tramway is claimed to be exercised by virtue of the Act, would limit its operation within far too narrow limits. This case is within the principle of *Reg.* v. *Croydon and Norwood Tramways Co.* (1) The provisions of s. 60 must be read subject to the other provisions of the Act. It is quite consistent with its terms that, although the powers of the road authority to improve the road are in general preserved, they must be reasonably exercised, and, if there is a dispute as to what is a reasonable exercise of them, that is to be referred under s. 33. Sect. 32, sub-s. 3, seems to imply that such powers must be reasonably exercised.

*Philbrick, Q.C.*, in reply. *Reg.* v. *Croydon and Norwood Tramways Co.* (1) is distinguishable. There the local authority were interfering with regard to work done by the tramway company under their Act. Here the local authority are proposing to do work not under the Tramways Act, but in the exercise of their powers as road authority under the Public Health Act, 1875.

*Cur. adv. vult.*

June 16. The following judgments were delivered:—

LORD ESHER, M.R. In this case a tramway company formed under the Tramways Act, 1870, asks for an injunction to restrain a road authority from interfering with part of the road, that is to say, such part of it as lies between the tram rails and extends eighteen inches beyond the rails on each side of the tramway, until the question whether it is reasonable that they should alter that portion of the road, as they propose to do, has been referred to and decided by an engineer nominated by the Board of Trade. The question involved depends upon the true construction of the 33rd section of the Tramways Act, 1870, read in conjunction with the 60th and some other sections. In order to arrive at the true

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construction of the section, it is necessary to refer to several of the preceding sections with the view of seeing whether there are not matters which will satisfy the terms of s. 33 without imposing any limitations on the terms of s. 60. The 4th section provides that provisional orders authorizing the construction of tramways in any district may be obtained by the local authority of the district, or by any person, persons, corporation, or company, with the consent of the local authority of such district; or of the road authority of such district, where it is or forms part of a highway district formed under the "Highway Acts;" and "any such local authority, person, persons, corporation, or company shall be deemed to be promoters of a tramway and are in this Act referred to as 'the promoters.'" By s. 26 the promoters have conferred upon them, for the purpose of making and maintaining the tramway, power to break up the road; but, as might be expected, this power is subject to a certain amount of control, and is not to be exercised except under the superintendence and to the reasonable satisfaction of the road authority. So, also, where a carriage-way over a bridge forms part of the road, and the bridge is vested in some person or persons, corporation or company, distinct from the road authority, any work which the promoters may be empowered to construct, and which affects or interferes with the structural works of the bridge, is to be constructed under the superintendence, and to the reasonable satisfaction of such person or persons, corporation or company. Again, where the carriage-way in or upon which the tramway is proposed to be formed, is crossed by any railway or tramway on the level, any work which the promoters may be empowered to construct, and which affects or interferes with such railway or tramway or the traffic thereon, is to be constructed and maintained under the superintendence and to the reasonable satisfaction of the owners of such railway or tramway. Therefore there are various matters under s. 26 which may be in dispute between the promoters and the road authority or other persons or bodies. Then, by s. 27, when the promoters have broken up the road, they are to complete the works within a certain time, and reinstate the road to the satisfaction of the road authority. Then we come to s. 28. The previous sections conferred powers on the promoters

subject to certain control and certain conditions. This section imposes upon them an obligation in consequence of the privileges previously conferred upon them. They are at their own expense to maintain and keep in repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of the road as lies between the rails of the tramway and as extends eighteen inches beyond the rails on each side of the tramway; that is to say, they are not merely to keep their own tramway in order, but part of the road which belongs to the local authority. And it is further provided that, if the promoters fail to comply with the provisions of the section, the road authority may themselves at any time after seven days' notice to the promoters, do the works necessary for the repair and maintenance of the road to the extent in the section mentioned, and the expense incurred by them in so doing is to be repaid to them by the promoters. In such case, therefore, there is work to be done by the road authority under the Act. By the 30th section, power is given to the promoters for the purposes of their undertaking to alter the position of mains or pipes for the supply of gas or water or any tube, wires, or apparatus for telegraphic or other purposes, subject to certain restrictions. They are to give notice to the owners of such mains or pipes, tubes, wires, or apparatus, of their intention to lay down or alter the tramway, whether they contemplate altering the positions of any such mains or pipes, wires or apparatus, or not; and, if it appears to any such owners that the construction of the tramway as proposed would endanger any such main or pipe, tube, wire, or apparatus, or interfere with or impede the supply of water or gas or the telegraphic or other communication, they may give notice to the promoters to alter the position of the said mains or pipes, tubes, wires, or apparatus in such manner as may be considered necessary, and any difference as to such necessity is to be settled in the manner provided by the Act for the settlement of differences between the promoters and other companies or persons.

The sections to which I have referred deal with powers which the promoters are to have as against authorities and other bodies or persons, and the restrictions and obligations to which such powers are to be subject; the 32nd section deals with powers of

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authorities and other bodies or persons as against the promoters, and provides that nothing in the Act shall take away or abridge any power to break up the road or any other power vested in any local authority or road authority, for any of the purposes for which such authority is constituted, or in any company, body, or person for the purpose of laying down, repairing, altering or removing any pipe for the supply of gas or water, or any tubes, wires, or apparatus for telegraphic or other purposes. But such powers are to be exercised subject to certain restrictions. As little inconvenience is to be occasioned to the promoters as circumstances admit. Notice is to be given (except in cases of urgency) to the promoters of the intention to do such work, before any work which will interrupt the traffic on the tramway is commenced. No compensation is to be payable to the promoters for injury done to the tramway by the work or for loss of traffic, or for the reasonable exercise of such powers. Whenever for the purpose of enabling them to execute such work, the local authority or road authority shall so require, the promoters are either to stop traffic on the tramway where it would otherwise interfere with such work, or to shore up or secure the same at their own risk and cost during the execution of the work there; and such work is to be completed by the local authority or the road authority with all reasonable expedition. These are the restrictions which affect work which may be done by the local or road authority under the powers referred to by the section. With regard to work to be done by any company, body, or person under such powers, so far as it immediately affects the tramway, it is to be executed under the superintendence of the promoters and to their reasonable satisfaction. These are all the material provisions which precede that contained in the 33rd section. I cannot see that any of them affect the right of the road authority to do what is proposed to be done in the present case, if they think it necessary in the interests of the public. Then is there anything in the 33rd section which affects their right? That section provides for cases where a difference "arises between the promoters or lessees on the one hand, and any local authority or road authority, or any gas or water company, or any company, body, or person to whom any sewer, drain, tube, wires, or apparatus for telegraphic or

other purposes may belong, or any other company, on the other hand." Then what is the difference provided for? It is "with respect to any interference or control exercised, or claimed to be exercised, by them or him, or on their or his behalf, or by the promoters or lessees by virtue of this Act, in relation to any tramway or work, or in relation to any work or proceeding of the local authority, road authority, body, company, or person." Stopping there for a moment, it has been suggested that the words "by virtue of this Act" must be read as referring to the words "promoters or lessees." So to read the words would give them no meaning. The word "promoters" has already been interpreted in s. 4. I am clearly of opinion that the words govern the whole of the portion of the section in which they are, and relate to the differences which may arise with respect to any interference or control exercised or claimed to be exercised in relation to any tramway or work, or in relation to any work or proceeding of the local authority, road authority, body, company, or person. Then the section proceeds: "or with respect to the propriety of or the mode of execution of any work relating to any tramway, or with respect to the amount of any compensation to be made by or to the promoters or lessees, or on the question whether any work is such as ought reasonably to satisfy the local authority, road authority, body, company, or person concerned." I may observe that the terms of the language used seem appropriately to refer to the matters to which I have alluded in the previous sections which may form the subject of differences under the Act. Then come the words "or with respect to any other subject or thing regulated by or comprised in this Act." With regard to these words, "regulated by or comprised in this Act," the question arises whether they are to be construed as only affecting the words immediately preceding them, or whether they do not throw light on what has gone before and govern the whole section. It seems to me that what the words used import is that the differences referred to by the latter part of the section are differences with respect to "other" subjects and things regulated by or comprised in the Act, just as in the earlier portion of the section the differences contemplated were with respect to matters arising "by virtue of the Act." The section provides

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that all these differences shall be referred to an engineer or other referee nominated by the Board of Trade. It follows from the view which I have expressed that the only differences which are to be so referred are differences in respect of matters arising between the parties, between whom such reference is to be, by virtue of, or which are regulated by or comprised in, the Act. Upon that construction of the section it appears to me that it by no means interferes with the provisions of s. 60, which provides that nothing in the Act shall take away or affect any power which any road authority may have by law to widen, alter, divert, or improve any road. The right now claimed on behalf of the plaintiffs would most seriously affect the power of a road authority to alter or improve a road. Sect. 61 provides that nothing in the Act shall limit the powers of the local authority or police in any district to regulate the passage of traffic along or across the road along or across which any tramways are laid down, and that such authority or police may exercise their authority as well on as off the tramways, and with respect to the traffic of the promoters as well as that of other persons; and s. 62 provides that nothing in the Act shall take away or abridge the right of the public to pass along or across every or any part of the road, whether on or off the tramway, with carriages not having flange wheels or wheels suitable only to run on the rail of the tramway. Therefore, all the powers of the authorities to regulate the traffic on the road, including the tramway itself, and all the rights of the public to go on the road, including not only the space between the rails but the rails themselves, are carefully preserved.

On consideration of the provisions of the Act, to which I have referred, it does not appear to me that the reservation of the rights and powers of the road authority with regard to alteration and improvement of the road, which is contained in s. 60, is in anywise affected by the provisions of s. 33. The 60th section reserves absolutely the power of the road authority to alter or improve the road; and it is clear that it is within that power to lay down a wood pavement instead of granite setts. It seems to me that it never could be intended that the question whether that is a reasonable course as between the public and

the tramway company should be referred to an engineer appointed by the Board of Trade, as provided by s. 33. Such a referee may very properly decide whether work has been well done, and whether it will answer the purpose for which it is intended in connection with the tramway. But I do not think that it would be appropriate that he should determine whether, as between the public and the tramway company, it is reasonable in the interests of the public that the road should be paved with wood instead of granite setts. The result of the argument for the tramway company would be that, when a tramway has once been laid down on a road, the road authority can never afterwards alter the road to meet the wants of the public except with the sanction of an engineer appointed by the Board of Trade. I do not think that can have been intended. This difference is not as to any matter under the Tramways Act, but as to what is reasonable as between the public and the tramway company with regard to the proposed alteration of the road. No such matter is, as it appears to me, provided for by any of the sections to which I have alluded. I am, therefore, of opinion that the rights and powers of the road authority to alter the road for the benefit of the public, as they here propose to do, including that portion of the road which is between the tramway rails, is absolutely preserved by the Act. For these reasons I agree with the conclusion arrived at by Vaughan Williams, J., and am of opinion that this appeal must be allowed.

LINDLEY, L.J. I am of the same opinion. The question in this case is whether the defendants, who are the road authority, and upon whom the duty of repairing and maintaining the road in the interests of the public is imposed, are, in the exercise of their powers and the discharge of their duty to the public, subject to the restriction contended for in the interest of the tramway company; and therefore whether the defendants must, before they can do what they propose to do to the road for the benefit of the public, proceed to a reference before a referee appointed by the Board of Trade. The answer to that question depends on the construction of the 33rd section of the Tramways Act, 1870. I will not go through the sections of the Act again, as I entirely

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agree with the construction put upon them by the Master of the Rolls. It seems to me, having regard to the provisions of s. 60, that the view taken by Denman, J., cannot be supported. No doubt the powers of the defendants must be more or less affected by the existence of the tramway, and to some extent therefore the expressions used in s. 60 must be controlled by the other provisions of the Act; but I do not think that the powers reserved by that section are controlled as the plaintiffs contend. That section appears to me to preserve the power of the road authority to alter the road as they think right in the interests of the public. It was said that this case was governed by the case of *Reg.* v. *Croydon and Norwood Tramways Co.* (1), but there is a most material difference between that case and the present. In this case the defendants are proposing to do a work on behalf of the public, which in my opinion they have a right to do. In that case work had been done by the tramway company with which the road authority sought to interfere, and the difference was one which plainly came within the terms of s. 33. The case is no authority for the proposition sought to be established in the present case by the plaintiffs. I think that the appeal must be allowed.

LOPES, L.J. The corporation are laying down the whole roadway, including the part on which the tram lines run, with wood pavement in substitution for granite setts, such pavement to be laid at the expense of the corporation; and the corporation have given notice to the tramway company of their intentions. The tramway company ask for an injunction to restrain the corporation from so doing, until there has been a reference under the 33rd section of the Tramways Act, 1870, to the Board of Trade. The question is whether the corporation are entitled so to act before and without any such reference. I am of opinion that the tramway company are not entitled to an injunction. They rely on the 33rd section of the Tramways Act, and, unless they can bring themselves within that section, they have no case.

Sects. 32 and 60 of the Tramways Act in most clear and unmistakable terms shew that the legislature intended that the road authority should continue to possess all the powers which

(1) 18 Q. B. D. 39.

they possessed before 1870, subject only to the restrictions contained in s. 32. But do the tramway company bring their case within s. 33? I think not. Sect. 33 gives a reference where there is a difference with respect to an interference or control exercised or claimed to be exercised by virtue of the Act, i.e. the Tramways Act. To be subject-matter of a reference it must be something done or claimed to be done by virtue of the Act, or something regulated by or comprised in the Act. The corporation here are not doing anything by virtue of the Act; or anything regulated by or comprised in the Act; but are exercising powers outside the Act and vested in them independently of the Act.

In *Reg.* v. *Croydon and Norwood Tramways Co.* (1) the corporation were seeking to exercise statutory control over the tramway company in relation to work of the tramway company, and there was a question whether such work was such as to satisfy the local authority. There was plainly a difference falling within the words of the 33rd section. That case is, therefore, distinguishable from this. I agree with the judgment of Vaughan Williams, J., and think that this appeal must be allowed.

*Appeal allowed.*

Solicitors for plaintiffs: *Walter Webb & Co, for Stanley, Wasbroughs & Doggett.*

Solicitors for defendants: *Robins & Co. for D. Travers Burges.*

(1) 18 Q. B. D. 39.

E. L.

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*May* 14, 15.

## IN RE THE LOCAL BOARD OF WARMINSTER AND THE COUNCIL OF THE COUNTY OF WILTS.

*Highway—Main Roads—Footways, Maintenance and Repair of, in Urban Sanitary Districts—Highways and Locomotives (Amendment) Act,* 1878 (41 & 42 *Vict. c.* 77), *s.* 13—*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *s.* 11.

By s. 11 of the Local Government Act, 1888, every road in a county, which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878, if repairable by the highway authority, shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate, and such council, for the purpose of the maintenance, repair, improvement, and enlargement of, and other dealing with such road, shall have the same powers and be subject to the same duties as a highway board:—

*Held*, that this section imposed upon the county council the duty of maintaining and repairing, in an urban sanitary district, the footways at the sides of disturnpiked roads which were constituted main roads by s. 13 of the Highways and Locomotives (Amendment) Act, 1878.

CASE stated for the decision of the High Court of Justice under s. 29 of the Local Government Act, 1888 (51 & 52 Vict. c. 41).

The local government district of Warminster, in the county of Wilts, is an urban sanitary district under the Public Health Act, 1875, and the local board of Warminster is the urban sanitary authority in that district.

Sect. 13 of the Highways and Locomotives (Amendment) Act, 1878 (41 & 42 Vict. c. 77), enacts: "For the purposes of this Act, and subject to its provisions, any road which has, within the period between the 31st day of December, 1870, and the date of the passing of this Act, ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one half of the expenses incurred from and after the 29th day of September, 1878, by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county

rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such main road has been maintained to his or their satisfaction."

Sect. 15: "Where it appears to any highway authority that any highway within their district ought to become a main road by reason of its being a medium of communication between great towns, or a thoroughfare to a railway station, or otherwise, such highway authority may apply to the county authority for an order declaring such road, as to such parts as aforesaid, to be a main road; and the county authority, if of opinion that there is probable cause for the application, shall cause the road to be inspected, and, if satisfied that it ought to be a main road, shall make an order accordingly."

Sect. 11 (1) of the Local Government Act, 1888, enacts: "Every road in a county, which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878, inclusive of every bridge carrying such road, if repairable by the highway authority, shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate, and such council, for the purpose of the maintenance, repair, improvement, and enlargement of, and other dealing with such road, shall have the same powers and be subject to the same duties as a highway board, and may further exercise any powers vested in the council for the purpose of the maintenance and repair of bridges, and the enactments relating to highways and bridges shall apply accordingly; and the county council shall have the same powers as a highway board for preventing and removing obstructions, and for asserting the right of the public to the use and enjoyment of the roadside wastes; and the execution of this section shall be a general county purpose, and the costs thereof shall be charged to the general county account.

"(2.) Provided that any urban authority may, within twelve months after the appointed day, or in case of a road in the district of such authority becoming a main road at any subsequent date, then, within twelve months after that date, claim to retain the powers and duties of maintaining and repairing a main road

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within the district of such authority, and thereupon they shall be entitled to retain the same, and for the purpose of the maintenance, repair, improvement, and enlargement of, and other dealing with such road, shall have the same powers and be subject to the same duties as if such road were an ordinary road vested in them; and the council shall make to such authority an annual payment towards the costs of the maintenance and repair, and reasonable improvement connected with the maintenance and repair of such road.

"(3.) The amount of such payment shall be such annual sum as may be from time to time agreed on, or, in the absence of agreement, may be determined by arbitration of the Local Government Board."

There are within the urban sanitary district of Warminster certain main roads within the meaning of the Highway Act of 1878.

Such roads, prior to their becoming main roads, consisted of four distinct classes, as follows:—

(*a.*) Roads which had formerly been turnpike roads, but which had ceased to be such within the period between December 31, 1870, and the date of the passing of the Highway Act of 1878.

(*b.*) Roads which were turnpike roads at the date of the passing of the Highway Act of 1878, but have since ceased to be so.

(*c.*) Roads which had formerly been turnpike roads, but had ceased to be such prior to December 31, 1870.

(*d.*) Roads which had always been ordinary highways repairable by the inhabitants at large.

Prior to the establishment of the local board in Warminster in the year 1867, the highways were under the management of the "board for the repair of highways for the parish of Warminster," appointed under the 18th section of the Highway Act, 1835 (5 & 6 Wm. 4, c. 50). Since the establishment of the local board the highways within the urban district have been under the management of that board, in pursuance of the Public Health Act, 1875 (38 & 39 Vict. c. 55).

The roads referred to in class (*a*) became main roads on the passing of the Highway Act, 1878, under s. 13 of that Act. The roads referred to in class (*b*) became main roads under the same

section on their ceasing to be turnpike roads. The roads referred to in classes (*c*) and (*d*) were subsequently declared main roads under s. 15 of the same Act.

On portions of the sides of each of these kinds of main roads there were and are footpaths or footways which, in the streets of the town, were flagged, paved, pitched, or asphalted, as ordinary street pavements in towns, and in other parts were made of similar materials to the macadamized carriage roads, or were gravelled. In some parts of the town, and especially in the suburbs thereof, some of such footpaths or footways are at a higher level than the carriage way.

The footpaths or footways on the sides of turnpike roads were divided into two classes, viz.:—(1.) Pavements, paved or pitched causeways, or footpaths in the town within the meaning of the 112th section of the General Turnpike Act (3 Geo. 4, c. 126), which under that section were repairable by the inhabitants of the town, and have been maintained and repaired by the highway authority prior to the establishment of the local board, and since by that board. (2.) Causeways and footways not so paved or pitched within the meaning of the last-mentioned section, which were repairable and were repaired by the turnpike trustees under s. 111 of the last-mentioned Act.

On such roads ceasing to be turnpike roads the whole of the footpaths or footways adjoining such roads, whether in the town, or elsewhere in the urban district, were maintained and repaired by the highway authority prior to the establishment of the local board, and since by that board.

The footpaths or footways within the urban district, whether flagged, paved, pitched, asphalted, or otherwise constructed on the sides of the roads, in class (*d*), which were ordinary highways, have been made, repaired, and maintained by the highway authority prior to the establishment of the local board, and since by that board. No payment or contribution has ever been made under the Highway Act of 1878 in respect of any flagging, paving, pitching, or asphalting of any footpaths or footways within the urban district.

The local board scavenge, cleanse, water, and light their streets under the Public Health Act, 1875.

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The local board has claimed to retain the powers and duties of maintaining and repairing their main roads under s. 11, sub-s. 2, of the Local Government Act, 1888.

The questions for the opinion of the Court are:—

1. Whether under s. 11 of the Local Government Act, 1888 (having regard to any statutes and the common law relating to the matters in question) the county council is liable for the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of all or any of the above-mentioned footpaths or footways on the sides of main roads as parts of such main roads (whether such footpaths or footways are flagged, paved, pitched, gravelled, or otherwise constructed), or to make payments in respect thereof.

2. The like question in respect of paved or pitched crossings over such main roads.

3. The like question in respect of the scavenging, cleansing, and watering of the streets and roads which are main roads, and of the said footpaths or footways.

4. The like question in respect of the lighting of the streets and roads which are main roads.

5. Whether, if the local board alter the flagging or pavement of the footways in the streets of the town, as for instance by substituting flagging, or pavement, or wood, or asphalte, for gravel or other substance, the county council is, under s. 11 of the Act, liable for the cost of such alteration, and for any increased cost of repair or maintenance resulting therefrom.

*MacMorran*, (*R. Henn Collins, Q.C.*, with him), for the Local Board of Warminster. The county council are bound, under s. 11 of the Local Government Act, 1888, to contribute to the repair of the various footways described in the case on each side of the main roads. It is clear, with respect to main roads in rural districts which were turnpike roads, that the footways are part of the road which the turnpike trustees were bound to repair: *Loveridge* v. *Hodsoll.* (1) In urban districts it is true that the turnpike trustees were not bound to repair such footways; but when a turnpike trust ceased the highway authority

(1) 2 B. & Ad. 602.

had the duty of repairing the entire road, and the county council becomes liable to do what the highway authority had to do, and not merely what the turnpike trustees did. In other words, the duty cast on the county council by s. 11 of the Local Government Act, 1888, is the duty of repairing main roads as the highway authority, and not as turnpike trustees. There is no good reason why the statute should have intended to transfer the liability in respect of part of the road only. The footway is part of the road, and there would be great inconvenience, if it were desired to widen the road for instance, in having two distinct authorities liable respectively to repair carriage-way and footway. Many cases have decided that a highway comprises all the space between the fences on either side of it, and a person who has placed an obstruction on the footway may be indicted for obstructing the highway. The word "roads" in s. 11 of the Local Government Act, 1888, is intended to comprise the same thing. If the county council is liable to contribute to the cost of the repairs of the footways in question, they are liable in respect of the cost of flagging, paving, pitching, or gravelling them. Sub-s. 2 of s. 11 gives very large powers to an urban authority claiming to retain the control of main roads. "For the purpose of the maintenance, repair, improvement, and enlargement of, and other dealing with such road," they are to have "the same powers, and be subject to the same duties as if such road were an ordinary road vested in them." These wide terms were probably introduced in consequence of the decision in *Leek Improvement Commissioners* v. *Justices of Stafford* (1), in which the Court of Appeal held that converting a macadamized road into a paved road was not covered by the term "maintenance" in s. 13 of the Act of 1878. Flagging, paving, pitching, or gravelling come within the word "improvement" in s. 11, sub-s. 2 of the Act of 1888. The first question asked in this case ought, therefore, to be answered in favour of the local board. As to the second question, paved or pitched crossings over the main roads are part of the road itself, and the same answer should be given to that question. As to the third, scavenging, cleansing, and watering the road are perhaps not strictly "maintenance"; but it has been

(1) 20 Q. B. D. 794.

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held, by Grantham, J., at nisi prius, that the county authority is liable in so far as those operations are necessary for maintenance, but not liable in so far as they are necessary for sanitary purposes: *Mayor of Burnley* v. *County Council of County Palatine of Lancashire.* (1)

[*R. S. Wright*, for the county council, expressed his concurrence with that view.]

As to the 4th question, having regard to sub-s. 4 of s. 11 of the Local Government Act, 1888, I concede that the duty of lighting streets and roads which are main roads is not transferred to the county council. The fifth question should be answered in the same way as the first.

*R. S. Wright*, for the county council. Sect. 11 of the Local Government Act, 1888, does not impose upon the county council the duty of contributing to the cost of the repair of the footways on the sides of such main roads as were formerly turnpike roads. There is a series of previous enactments tending to shew that the legislature intended to deal with the road, and not with the footways. By the General Turnpike Act (3 Geo. 4, c. 126, s. 111) the turnpike trustees are empowered to repair footways in country districts; but by s. 112 power to deal with footways within towns is expressly excluded, unless the Act under which the turnpike road is made specially authorizes them to do so. By the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144, urban authorities have vested in them the office, within their district, of surveyors of highways, and they are also to have, exercise, and be subject to all the powers, duties, and liabilities of the inhabitants under the Highway Act, 1835, and any Act amending the same. By s. 148 they may enter into agreements with the trustees of any turnpike road as to the repair of "any street or road," and by s. 149 "all streets being, or which at any time become, highways repairable by the inhabitants at large" within their district, shall vest in and be under the control of the urban authority, to whom power is given to level, pave, metal, flag, channel, alter and repair them as occasion may require; and by s. 4, "street" includes any highway (not being a turnpike road) . . . and any road, lane, footway . . . whether

(1) 54 J. P. 279.

a thoroughfare or not." At the time, therefore, of the passing of the Highways and Locomotives (Amendment) Act, 1878, the urban authority repaired the footways at the sides of turnpike roads within their district, and the turnpike trustees repaired the road itself. By the Act of 1878 two classes of roads were dealt with as "main roads," first, under s. 13, roads which had become, or were to become, disturnpiked, and secondly, under s. 15, highways which the highway authority might declare to be main roads. The Act carefully preserves the distinction between "roads" which had been turnpike roads, and highways which had never been turnpike roads, and it is remarkable that in all the cases which have been decided upon it no claim for one-half of the expenses of the maintenance of footways by the sides of disturnpiked roads in towns has been made by a highway authority against a county authority. It is contended that s. 11 of the Local Government Act, 1888, intended to preserve that distinction, and to limit the liability of the county council to the obligation to repair in respect of which the county authority, under the Act of 1878, paid half the expenses, namely, the obligation which the turnpike trustees had to repair the turnpike road exclusive of the footways, because the operation of s. 11 is limited in express terms to "every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878." There is nothing in sub-s. 2 of s. 11 to conflict with that view. It is very unlikely that the legislature intended by the Act of 1888 to cast any part of the burden of the maintenance of footways in town upon the county council. The cost of maintaining them by paving, &c., is very often far larger than the cost of maintaining the road itself, and the cost was defrayed, without complaint, by the ratepayers, out of the general district rate. In *Loveridge* v. *Hodsoll* (1) the footway in question was within the exception in s. 111 of 3 Geo. 4, c. 126. There is nothing in the Acts of 1878 and 1888 which shews any intention to interfere with the sanitary obligations of the urban authority under s. 149 of the Public Health Act, 1875. In *Justices of Lancashire* v. *Mayor of Rochdale* (2) there were dicta in the judgments delivered in

(1) 2 B. & Ad. 602. (2) 8 App. Cas. 494.

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the House of Lords which seem to support the contention of the county council in respect of the meaning of the words "shall cease to be a turnpike road" in s. 13 of the Act of 1878.

*R. Henn Collins, Q.C.*, in reply. The case is now narrowed to the questions whether the roads specified in the case are "repairable by the highway authority," within s. 11 of the Act of 1888, and whether "road" includes footway. The liability to repair highways always rested upon the inhabitants. When a road which was a highway became subject to turnpike trusts that liability did not cease, and the inhabitants were indictable if the trustees did not repair. Sect. 112 of 3 Geo. 4, c. 126, cast upon the inhabitants a liability to repair road and footways, which liability co-existed with the trustees' liability to repair the road. When the turnpike trusts expired the inhabitants' liability remained. There is no trace of an intention in s. 13 of the Act of 1878 to take away that liability. The highway authority, as representing the inhabitants, were under the obligation, when the Act of 1878 was passed, to repair both road and footway, and that obligation is what has been transferred to the county council by s. 11 of the Act of 1888. If the contention made for the local board be correct, it should apply equally to footways which are part of highways declared to be main roads under s. 15 of the Act of 1878. There is no reason why the legislature should have intended to make any difference between those footways and footways belonging to main roads which were turnpike roads.

GRANTHAM, J. This case raises an important question, because our decision will no doubt affect a great many local authorities; but when the Acts of Parliament are carefully looked at, and when the decisions given under the earlier Acts are followed out and applied to the construction of the sections in question in the Local Government Act, 1888, I have no doubt what our decision should be. I am of opinion that we cannot put a more limited construction on the words "main roads" in s. 11 of that Act than those words would have reading them in conjunction with the general legislation which has taken place from time to time in respect to roads. It is necessary first to find out what is the

meaning of the term "road" as used in s. 13 of the Highways and Locomotives (Amendment) Act, 1878, and s. 11 of the Local Government Act, 1888, and then what is the meaning of the term "main roads," and whether the legislature meant by using those words to effect the particular alteration contended for as regards the question of the footways on each side. It is conceded that under the old Highway Acts a road included the footways on each side. That being so, all the subsequent legislation down to 1878 dealing with roads, and effecting alterations with respect to the authorities liable for their repair, dealt with roads as including both the carriage-way and footway. Then came the Act of 1878, which introduced the important modification of throwing half the costs of the repair of certain roads upon the county authority as distinguished from the highway authority. As that Act does not say in terms that in urban districts the county authority were to be exempted from the expense of repairing the footways belonging to those roads, it must be assumed that the legislature intended that the alteration in the liability to repair should have the same incidence on the county authority in urban districts as in rural districts. Then came the Local Government Act, 1888, which imposed upon the county council, without any limitation, the liability of wholly maintaining those main roads, of which half the expense of maintenance was formerly borne by the county authority, under the Act of 1878. I think, again, that we must assume the legislature meant that which they purport to state, namely, that every road which is for the time being a main road shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate. There is no section in the Act of 1888 limiting the natural meaning of the word "road"—the meaning which has been attributed to that word as used in the legislation with respect to highways in this country for the last fifty years—and I do not see that we have any power to put any other than the natural interpretation upon it. I am therefore of opinion that we must answer the first question put in the case by saying that the county council is liable for the costs of the maintenance and repair, and reasonable improvement connected with the maintenance and repair, of the footpaths or

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footways on the sides of main roads as parts of such main roads, and to make payments in respect thereof. As to the second question, I am of opinion that the county council is also liable in respect of paved or pitched crossings over the main roads. As to the third question, counsel for the county council has given up his contention upon it. As to the fourth, counsel for the local board has given that up. As to the fifth, that must be left for decision in the particular case which may be brought before the authorities; or, if there is a dispute between them, before the Local Government Board. Under some circumstances the county authority would be liable for the cost of the alteration; under others, if the alteration was of a special character, and more than could fairly be considered an alteration likely to take place or desirable, then the local authority ought to bear the expense of an alteration which, upon the construction of the Act, could not have been intended to be cast upon the county authority.

I may add, that if the true construction of the Act is that there should, in urban districts, be two authorities having control over the highways and footpaths respectively, it might lead to very objectionable results, not only where it was thought desirable to widen the road at the expense of the footpath, or the footpath at the expense of the road, but in other respects. It would be objectionable as leading to friction between the authorities in respect of the repairing of the road and the cleansing of the paved footways. In my opinion, it would be an unfortunate state of things if there were two authorities dealing with the same road.

CHARLES, J. I am of the same opinion. We have to construe s. 11 of the Local Government Act, 1888, and in order to arrive at the proper construction of that section it is necessary to consider what is the proper construction of ss. 13 and 15 of the Highways and Locomotives (Amendment) Act, 1878, because s. 11 of the Act of 1888 enacts that, "every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878 . . . shall, after the appointed day, be wholly maintained and repaired

by the council of the county in which the road is situate." Now, ss. 13 and 15 of the earlier Act constituted two classes of road "main roads." They were, in the first place, roads which had ceased, or which would cease, to be turnpike roads; and, in the second place, under s. 15, any highways which appeared to the highway authority proper to be made main roads. At the time of the passing of the Act of 1878, the highway authority had a double duty imposed upon it with respect to the repair of roads which had been disturnpiked before the passing of the Act. In the first place, it had the duty of repairing the footways, which the turnpike trustees, in urban districts at any rate, were never under any duty to repair; in the second place, it had the duty, which after the close of the turnpike trusts was restored to it as representing the inhabitants at large, of repairing the highways. Therefore, at the time of the passing of the Act of 1878, there was imposed upon the county authority, with respect to disturnpiked roads, the duty of repairing road and footway alike. The same observation applies to those highways which are dealt with in s. 15—highways, that is, which had never been turnpike roads at all. As to those, the duty to repair had rested at all times upon the inhabitants at large, and at the time of the passing of the Act the duty of repairing both road and footway rested upon the highway authority. Therefore the legislature passed the Act of 1878 in this state of things; they were dealing with disturnpiked roads, or roads which would be thereafter disturnpiked, and they were dealing with ordinary highways; and they provided that one-half of the expenses incurred "by the highway authority in the maintenance of such roads" should be paid to the highway authority by the county authority. Now, we have been invited by Mr. Wright to read those words thus: "one-half of the expenses incurred by the highway authority, as successors of the turnpike trustees, in the maintenance of such roads," and reading in those words, and referring us to the Turnpike Act of 3 Geo. 4, c. 126, ss. 111 and 112, he pointed out to us that there was no duty upon the turnpike trustees to repair the footways; on the contrary, that duty was, as respected urban districts, reserved to the inhabitants at large. The effect of the two sections was to empower

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the turnpike trustees to keep the footways in rural districts in repair; but, with regard to the footways in urban districts, undoubtedly the Act reserved the liability to repair them, and left it where it had always been, upon the inhabitants at large. I see no ground for saying that we have power to insert in s. 13 of the Act of 1878 the limitation suggested with respect to the footways. Having regard to the fact that the same Act of Parliament deals with two classes of main roads—one disturnpiked roads, and the other ordinary highways—and that, at the time the Act was passed, the highway authority undoubtedly had the duty of repairing both highway and footway, I think it is impossible to insert any such limitation. As Mr. Collins pointed out, the existence of a turnpike trust at no time made any alteration in the liability of the inhabitants at common law; and although turnpike trusts existed, and although turnpike trustees failed in their duty, it was not they who became indictable, but the inhabitants of the parish or the district through which the road ran. It seems to me that, the turnpike trusts having come to an end, the legislature means exactly what it says, and neither more nor less, when it enacts that in the case of these disturnpiked roads one-half of the expenses incurred by the highway authority in the maintenance of those roads is to be borne by the county authority, the expenses of the highway authority including at that time undoubtedly both the expense of repairing the footway and the expense of repairing the roadway.

Now, that being the construction which I put upon the Act of 1878, I do not feel any difficulty with reference to the Act of 1888. Sect. 11 of that Act places the whole of the expense upon the county council. It may be open to doubt, under the Act of 1878, whether, in the case of roads which were simply declared main roads under s. 15, one half of the expenses could legally be thrown on the county authority, though in practice I am told that the county authority has never raised any objection to paying them; but however that may be, it is quite certain now, that under the Local Government Act, 1888, the whole of the expenses of the maintenance of main roads—that is to say, main roads from hedge to hedge, including the footways, is thrown on the county council.

That disposes of the case. The urban authority in this instance have chosen to exercise the power reserved to them, under sub-s. 2 of s. 11, of claiming to retain the duty of maintaining and repairing the main roads, and, therefore, having done so, they are entitled to an annual payment or contribution from the county council; and they have to perform the duties which otherwise the county council would have to perform, and may demand of the county council an annual payment to cover the cost of maintenance and repair and reasonable improvement. I may add, with reference to question five, that if the alteration or substitution of flagging and paving for gravel is, under the circumstances, a reasonable improvement, undoubtedly that ought to be borne by the county council; but whether in any particular instance it is an improvement or not seems to me to be a matter which, in case of difference, must, under sub-s. 5 of s. 11 of the Act of 1888, be determined by arbitration of the Local Government Board. It is unnecessary for me to add anything with reference to the answers we return to questions two, three, and four.

*Questions decided accordingly.*

Solicitors for the local board of Warminster: *Berkeley & Calcott, for Wakeman & Bleech, Warminster.*

Solicitors for the county council: *Merriman, Pike, & Merriman, for R. W. Merriman, Marlborough.*

W. A.

1890
*July* 23.

[IN THE COURT OF APPEAL.]

CLARK *v.* SONNENSCHEIN.

*Practice—Official Referee, Judgment of—Appeal—Power of Court to enter Judgment—Order* XXXVI., *r.* 52; *Order* LIX., *r.* 3.

On appeal from an official referee who has ordered judgment to be entered for the plaintiff, the Court has power not only to set aside such judgment, but to enter judgment for the defendant.

APPEAL from the judgment of the Queen's Bench Division (1) upon a motion to set aside the findings and judgment of an official referee, and to enter judgment for the defendants.

The action had been referred compulsorily to an official referee, who had ordered judgment to be entered for the plaintiff. The Divisional Court held that the judgment of the official referee upon the facts was wrong, and that they had power not only to send the case back to the official referee for re-hearing, but to enter judgment for the defendants, and judgment was ordered to be entered accordingly. The plaintiff appealed.

*Channell, Q.C.*, and *Heather*, for the plaintiff.

*Houghton*, for the defendants, was not called upon to argue.

LORD ESHER, M.R. As to the point of practice, I am clearly of opinion that the decision of an official referee is subject to the same rules as to appeal as the decision of a judge trying a case without a jury. I entirely concur with the judgment of Vaughan Williams, J.

LINDLEY, L.J. I am of the same opinion. Order XXXVI., r. 52, is applicable to the case, and the Divisional Court had power to enter judgment for the defendants.

BOWEN, L.J. I agree. It is suggested that the finding of an official referee is to be treated as a verdict, and that it should only be reversed or set aside if the Court is satisfied that it is perverse or unreasonable. I do not think so, nor do I think that

(1) Ante, p. 226.

the language of the Court of Appeal in *Miller* v. *Pilling* (1) ought to be so understood.

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*Appeal dismissed.*

Solicitors for plaintiff: *Heather & Sons.*

Solicitors for defendants: *Powell & Rogers.*

W. J. B.

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[IN THE COURT OF APPEAL.]

*July* 30.

ONSLOW *v.* COMMISSIONERS OF INLAND REVENUE.

*Practice—Appeal to Court of Appeal—Time for Appealing—"Judgment" or "Order"—Order* LVIII., *rr.* 3, 9, 15.

The decision of a Divisional Court upon a case stated by the Commissioners of Inland Revenue under s. 19 of the Stamp Act, 1870, is an "order," and not a "judgment," and an appeal from such decision to the Court of Appeal must be brought within twenty-one days.

APPLICATION for an extension of time for appealing from a decision of a Divisional Court in favour of the Commissioners of Inland Revenue upon a case stated under s. 19 of the Stamp Act, 1870 (33 & 34 Vict. c. 97). The decision of the Divisional Court which is reported at 24 Q. B. D. 584, was given on January 21, 1890, and the application was made on the ground that doubts had arisen whether the decision was a "judgment" or an "order," within the meaning of Order LVIII., rr. 3, 15. (2)

*Danckwerts*, for the applicants.

*G. B. Rosher*, for the Commissioners of Inland Revenue.

LORD ESHER, M.R. In the present case it becomes necessary for us to determine what is meant by an order and a judgment,

(1) 9 Q. B. D. 736.

(2) By Order LVIII., r. 3, "Notice of appeal from any judgment, whether final or interlocutory, or from a final order, shall be a fourteen days' notice, and notice of appeal from any interlocutory order shall be a four days' notice."

By r. 15, "No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of twenty-one days, and no other appeal shall, except by such leave, be brought after the expiration of one year. . . . ."

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and to see what is the distinction between them. I entirely adopt the decision of Cotton, L.J., in *Ex parte Chinery* (1), a decision supported by Bowen and Fry, L.JJ. In that case Cotton, L.J., says: "In legal language, and in Acts of Parliament, as well as with regard to the rights of the parties, there is a well-known distinction between a 'judgment' and an 'order.' No doubt the Orders under the Judicature Act provide that every order may be enforced in the same manner as a judgment; but still judgments and orders are kept entirely distinct. It is not said that the word 'judgment' shall in other Acts of Parliament include an 'order.' I think we ought to give to the words 'final judgment' in this sub-section their strict and proper meaning, i.e., a judgment obtained in an action by which a previously existing liability of the defendant to the plaintiff is ascertained or established, unless there is something to shew an intention to use the words in a more extended sense." In the same case Bowen, L.J., says that there is an inherent distinction between judgments and orders, and that the words "final judgment" have a professional meaning; by which expression I think he meant to say, as Cotton, L.J., had previously said, that a "judgment" is a decision obtained in an action; and if that was his meaning, both those learned lords justices gave judgment to the same effect, and Fry, L.J., agreed with them. A "judgment," therefore, is a decision obtained in an action, and every other decision is an order. The language of Order LVIII., r. 9, which regulates the time for appealing from any order or decision in the matter of the winding-up of a company, or any order or decision in the matter of any bankruptcy, "or in any other matter not being an action," strongly fortifies this view, for it recognises a distinction between an order not obtained in an action, and a judgment or decision obtained in an action. That is, in my opinion, a proper distinction, and therefore in the present case the decision is an order, and not a judgment, and the appeal should have been brought, as it should in all cases where there is no action, within twenty-one days. Under the circumstances, however, we will, as an indulgence, extend the time for appealing.

(1) 12 Q. B. D. 342.

LINDLEY, L.J. I am of the same opinion. I was at first struck by the fact that the declaration of the Court upon a special case stated for the opinion of the Court of Chancery under 13 & 14 Vict. c. 35, is in several sections of that Act called a "decree," which is, of course the equivalent term to a "judgment" in the Queen's Bench Division; but the distinction just laid down by the Master of the Rolls is the proper one, and has my entire concurrence.

BOWEN, L.J. I am of the same opinion.

*Application allowed.*

Solicitors for applicants: *Rowcliffes, Rawle & Co.*
Solicitor for Commissioners: *Solicitor of Inland Revenue.*

W. J. B.

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[IN THE COURT OF APPEAL.]

*April* 23; *May* 19.

JAY *v.* ROBINSON.

*Husband and Wife—Married Woman—Second Marriage—Debts contracted before Marriage—Restraint upon Anticipation—Married Women's Property Act,* 1882 (45 *&* 46 *Vict. c.* 75), *ss.* 13, 19.

By s. 13 of the Married Women's Property Act, 1882, a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for "all debts contracted by her before her marriage." By s. 19, nothing in this Act shall affect any settlement made respecting the property of any married woman, or render inoperative any restriction against anticipation; but no restriction made in any settlement of a woman's own property to be made or entered into by herself shall have any validity against "debts contracted by her before marriage."

Judgment for a sum of money was recovered against a married woman, who subsequently obtained a dissolution of her marriage, and married again; and by settlement made by her on the second marriage property belonging to her was settled to her separate use without power of anticipation:—

*Held*, that the judgment debt was a "debt contracted before her marriage" within the meaning of s. 13, so that the defendant continued to be liable for it after her second marriage; and also that it was a "debt contracted before marriage" within the meaning of s. 19, so that the restriction upon anticipation contained in the settlement had no validity against it.

APPEAL from a decision of the Queen's Bench Division.

On August 6, 1886, the plaintiff, as executor of the will of J. F. Jay, deceased, obtained a judgment for 180*l.* and costs

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against the defendant, who was then a married woman living with her husband; the form of the judgment being that "the debt and costs be paid out of the defendant's separate estate, execution being limited to her separate property not subject to any restraint upon anticipation, unless by reason of the Married Women's Property Act, 1882, s. 19, such property should be liable to execution notwithstanding such restraint."

On June 19, 1888, the defendant obtained a decree absolute in the Probate, Divorce and Admiralty Division for a dissolution of her marriage. In August, 1888, the defendant made an application for an order varying the settlement made on her marriage by directing that there should be paid to her out of the funds settled upon her by her former husband a sum of 5000*l.*, and that the rights of each of the parties to that settlement should be extinguished. In June, 1889, whilst that application was still pending, the defendant married again, and by the terms of a deed of settlement made in contemplation of that marriage, it was provided that such sum as should, in the result of the application, be directed to be paid to the defendant, should be vested in the trustees of that settlement in trust to pay the income thereof during the joint lives of the defendant and her husband to the defendant for her separate use without power of anticipation.

In July, 1889, an order was made by the President of the Probate, Divorce, and Admiralty Division varying the terms of the first settlement, directing that the sum of 5000*l.* should be paid over to the trustees of the second settlement according to the terms thereof, and extinguishing the rights of each party under the first settlement. The sum of 5000*l.* was thereupon paid to the trustees of the second settlement.

Upon the application of the plaintiff, Field, J., at Chambers, made orders appointing a receiver in respect of the 5000*l.*, and granting an interim injunction restraining the defendant and her trustees from dealing therewith.

Charles, J., at Chambers, having subsequently, on the application of the defendant, rescinded the order appointing a receiver, and dissolved the injunction, a Divisional Court (Cave and A. L. Smith, JJ.) affirmed his order.

The plaintiff appealed.

*Cozens-Hardy, Q.C.* (*Alexander Robertson*, with him), for the plaintiff. The defendant is liable for the debt contracted by her during her first marriage. By s. 13 of the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), "a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage . . . and all sums recovered against her . . . shall be payable out of her separate property." The words "before her marriage" mean before her existing marriage, and should not be limited to debts contracted whilst she was a feme sole. If that construction be right, her separate property is liable notwithstanding any restraint upon anticipation: *Axford* v. *Reid* (1) [decided upon the same words in the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), s. 12]. By s. 1, sub-s. 4 of the Act of 1882, "every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." Here a judgment, unappealed against, has been obtained against the defendant. It must therefore be taken that she contracted the debt under her statutory power, and thereby bound her separate property in respect of that debt. In *Holtby* v. *Hodgson* (2) the judgments of the Court of Appeal shew that a judgment against a married woman is a judgment against her personally, though execution on the judgment is limited to her separate estate. Further, the 5000*l.* in question here was property brought into settlement by the defendant herself on her second marriage, and s. 19 of the Act of 1882 therefore applies to it. By that section, "Nothing in this Act contained shall interfere with or affect any settlement . . . made . . . respecting the property of a married woman, or shall . . . render inoperative any restriction against anticipation . . .; but no restriction against anticipation contained in any settlement . . . of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage." The words "before marriage" there refer to the existing marriage, so that the re-

(1) 22 Q. B. D. 548. (2) 24 Q. B. D. 103.

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striction upon anticipation contained in the defendant's second marriage settlement fails. It is contended that s. 19 applies to after-acquired property. An order for the appointment of a receiver, by way of equitable execution, ought therefore to be made.

*R. Henn Collins, Q.C.*, and *H. F. Boyd*, for the defendant. No order for the appointment of a receiver can be made. Sects. 13 and 19 of the Act of 1882 do not apply. The words in s. 13, "all debts contracted by her before her marriage," refer to common law debts which she may have contracted when a feme sole, and not to those obligations which the Act enables her to enter into during coverture to bind her separate property only. At common law the husband was bound to pay his wife's antenuptial debts; now he is only liable to the extent of the assets he gets with her. "Before her marriage" means "before she ever was married." The liability in respect of which judgment was recovered against the defendant must have been incurred under s. 1, and it is to be observed that in sub-s. 2, which renders a married woman capable of contracting in respect of her separate property, the word "debts" is never used. The word used is "contract," and though it is true that a person may make a "contract" which will result in a "debt," still the two terms have not the same meaning. In the decided cases a strong distinction has always been taken between the absolute right to contract of a feme sole, and the limited statutory right which is given to a married woman in respect of her separate property: *Palliser* v. *Gurney* (1); *Scott* v. *Morley*. (2) The same argument applies to the words, "debts contracted by her before marriage" in s. 19. The debts referred to are debts which the married woman has incurred before her marriage whilst she was a feme sole, and not to the obligations which the statute renders her capable of incurring in respect of her separate property during her coverture. All the judgments in *Scott* v. *Morley* (2) tend to shew that the Act imposes no personal liability upon a married woman. The exception in s. 19 has therefore no application to this case; and there is another reason why it should not apply. The settlement made upon the defendant's second marriage was

(1) 19 Q. B. D. 519. (2) 20 Q. B. D. 120.

not "a settlement of a woman's own property made or entered into by herself." The 5000*l.* in question was not the defendant's own property under the second settlement.

[They also cited *Downe* v. *Fletcher* (1) and *Beckett* v. *Tasker* (2).]

*Cozens-Hardy, Q.C.*, in reply, referred to *Heatley* v. *Thomas* (3) and *Field* v. *Sowle.* (4)

*Cur. adv. vult.*

May 19, 1890. LORD ESHER, M.R. In this case a judgment was obtained against the defendant, whilst she was married to her former husband, for the price of goods supplied to her by the plaintiff. It must be taken that the judgment was a valid judgment against her as a married woman in respect of her separate estate. It was not a judgment exactly in the form settled by this Court in *Scott* v. *Morley* (5), because that case had not then been decided, but it was substantially in that form. After that judgment was obtained the defendant obtained a divorce from her husband, and she subsequently married her present husband. At the time of her second marriage property then brought by her into settlement was settled upon her for life, subject to a restraint upon anticipation, and the question is whether, notwithstanding that restraint upon anticipation, she is bound to pay the judgment-debt out of her separate property. The question turns on the construction of the Married Women's Property Act, 1882. We have to decide what is the proper construction to be put upon ss. 13 & 19 of that Act; and the question will depend upon whether the words "before her marriage" in s. 13, and "before marriage" in s. 19 (which is the more applicable as regards the point now before us), mean "before the existing marriage," or "before ever having been married." By s. 1, sub-s. 4, "every contract entered into by a married woman with respect to, and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." The material words of s. 19 are, "but

(1) 21 Q. B. D. 11.
(2) 19 Q. B. D. 7.
(3) 15 Ves. 596.
(4) 4 Russ. 112.
(5) 20 Q. B. D. 120.

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no restriction against anticipation contained in any settlement, or agreement for a settlement, of a woman's own property to be made or entered into by herself, shall have any validity against debts contracted by her before marriage." It was argued for the defendant that the debts referred to in that section were debts contracted when the debtor was a feme sole, before she was married at all, and that this debt, being a debt contracted after the defendant's first marriage, was not within the section? The same question would arise if she had contracted the debt between her first and second marriages. The question was so important that we took time to consider it. Having considered it, we have come to the conclusion that the words "before her marriage" in s. 13, and "before marriage" in s. 19, do not mean "before ever having been married," but "before the marriage existing at the time her liability is under consideration." As the debt in this case was contracted before the defendant's existing marriage, it follows that the restriction upon anticipation contained in her second marriage settlement is void in respect of that debt, and that her separate estate is liable for it. We therefore differ from the view taken by the Divisional Court, and think that this appeal should be allowed.

FRY, L.J. I agree. As, however, I am differing from the decision of the Divisional Court, I think it right to state my reasons separately. [The Lord Justice then stated the facts.] The result is, in my opinion, that at the time of the second marriage the defendant had vested in her a chose in action, namely, whatever sum she might receive in the result of her application to have the trusts of the settlement made upon her first marriage varied. That chose in action was subsequently reduced into possession by virtue of the order to vary the trusts of that settlement made by the President of the Divorce Court. There can be no doubt that the sum of 5000*l.*, which, under that order, became payable to the trustees of the settlement made upon her second marriage, is her separate property; and, therefore, liable to her debts by s. 1, sub-s. 4, of the Married Women's Property Act, 1882, unless the Act contains some provision to the contrary. By sub-s. 4, "every contract entered into by a married

woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." The question then is whether s. 19 has in this case preserved the fetter imposed by s. 1, sub-s. 4. Sect. 19 enacts that nothing in the Act shall affect any settlement respecting the property of any married woman, or render inoperative any restriction against anticipation. Then follow the material words for the present purpose: "No restriction against anticipation contained in any settlement . . . of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage." It was urged forcibly for the defendant—first, that the settlement made upon the defendant's second marriage was not a "settlement of a woman's own property," within the meaning of s. 19; and, secondly, that the word "debts," as used in that section and in s. 13, is not applicable to the liability imposed upon a married woman's separate property by s. 1, but refers only to common law debts. With respect to the first question, I have already said that, in my judgment, the right to receive the 5000*l.* was the defendant's chose in action at the time of her second marriage, and that it was reduced into possession after the marriage. It thereupon became her own property. In order to decide the second question—whether the liability imposed by the Act upon the separate property of a married woman is a "debt" within the meaning of s. 19—it becomes necessary to consider all the provisions of the Act which deal with that liability. Sect. 1, sub-s. 2, makes a married woman capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract. That provision seems to point at something very like the power of creating a common law debt, but, though of itself it might not have that effect, sub-s. 5 throws a very strong light upon the question, because it enacts that "every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws as if she were a feme sole." People become subject to the bankruptcy laws only in respect of their debts; and it follows, therefore, that

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a married woman is considered capable of contracting debts. Again, s. 11 deals with the cases of policies of insurance effected by a husband for the benefit of his wife or children, or by a wife for the benefit of her husband or children, and it provides that "the moneys payable under any such policy shall not . . . be subject to his or her debts." The word "her" refers to a married woman. The same section also contains a proviso that, "if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive out of the moneys payable under the policy a sum equal to the premiums so paid." The "creditors of the insured" are the creditors of the husband or of the married woman. It seems to me, therefore, impossible to say that the obligations which the Act enables a married woman to contract are not her debts. I cannot doubt that the word "debts," as used both in s. 13 and in s. 19, comprehends both common law debts contracted by a woman whilst she is a feme sole and debts contracted under the Act, in respect of her separate property, during a previous marriage. It was said that debts contracted by a married woman had been held not to be debts within the meaning of the Debtors Act, 1869, but those decisions have no application here. Sect. 5 of that Act enables a Court to commit to prison any person who makes default in payment of any debt due from him, and it was held that a debt which was only recoverable out of the separate property of a married woman could not be said to be a debt due from her.

I think, therefore, that this appeal should be allowed.

LOPES, L.J. I entirely agree, and I will state my reasons very shortly. I am of opinion that the words "before her marriage" and "before marriage" in ss. 13 and 19 of the Married Women's Property Act, 1882, refer to the marriage existing at the time of the inquiry. I also think that the liability of a married woman under s. 1 is a debt. The liability in the present case is, therefore, a debt contracted by the defendant before marriage. I am also of opinion that the settlement made by the defendant on her second marriage was a settlement of the woman's own property within the meaning of s. 19. The right to receive the 5000*l.* was

her chose in action at the time of the second marriage, and it was subsequently reduced into possession by the order made in the Divorce Court. I am therefore of opinion that the restraint upon anticipation has no effect against the plaintiff's debt; that this appeal should be allowed; and that the order for the appointment of a receiver should be made.

*Appeal allowed.*

Solicitors for plaintiff: *Taylor, Hoare, Taylor, & Box.*

Solicitors for defendant: *Valpy, Chaplin, & Peckham.*

W. A.

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## NORMAN *v.* BINNINGTON.

*June* 16, 17; *July* 10.

*Ship—Bill of Lading—Exemption of Shipowner's Liability—Injury to Cargo—Negligence.*

A bill of lading contained the following, amongst other, exemptions from the shipowner's liability for injury to cargo: "Negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise, loss or damage arising from rain, storage or contact with other goods being excepted, and the ship not being liable for any consequence of the causes herein excepted, however caused or originated." The shipper's goods, after being placed on board, were injured by reason of persons, for whose acts the shipowner was responsible, negligently exposing them to rain and contact with other wet goods:—

*Held*, that the words "or otherwise" in the bill of lading referred to negligence in bringing about excepted loss or damage other than loss or damage caused in negligently navigating the ship, and therefore that the shipowner was not liable.

MOTION to enter judgment for the defendant, or for a new trial, in an action tried before Charles, J., and a jury at the Liverpool spring assizes, 1890.

The facts of the case, and the arguments of counsel, sufficiently appear from the judgment of the Court. (1)

*Bigham, Q.C.*, and *Joseph Walton*, for the defendant.

*Kennedy, Q.C.*, and *P. C. Morris*, for the plaintiff.

The following cases were cited, in addition to those mentioned in the judgment: *The Duero* (2); *Guillaume* v. *Hamburg and American Packet Co.* (3); *Carmichael* v. *Liverpool Sailing Ship*

(1) Post, p. 476.
(2) Law Rep. 2 A. & E. 393.
(3) 42 New York Rep. (3 Hand's Rep.) 212.

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*Owners Mutual Indemnity Association* (1); *Canada Shipping Co.* v. *British Owners Mutual Protection Association* (2); *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser, & Co.* (3); *Gleadell* v. *Thompson* (4); *Smith* v. *Hunt* (5).

*Cur. adv. vult.*

July 10. The judgment of the Court (Cave, A. L. Smith, and Vaughan Williams, JJ.) was read by

A. L. SMITH, J. This is an action by a shipper of goods against a shipowner, upon a bill of lading, for damage to goods after being loaded on board of the defendant's ship.

The facts are as follows: The plaintiff's goods (cotton seed cake) were loaded in the hold of the defendant's ship at the port of Galveston, and certain bales of cotton (not the plaintiff's) were also there put on board. It thereupon became necessary to complete the loading of the ship outside of the bar in the outer roads, and for this purpose the ship, with the plaintiff's goods on board, proceeded outside, and there anchored. Other cargo, namely cotton bales (not the plaintiff's), was then brought alongside in lighters, and loaded in the ship; and the jury have found that the plaintiff's cake was then damaged by rain-water, either by it falling directly through the open hatchway on to the cake, or by reason of wet bales of cotton being then placed upon the cake, and that there was negligence on the part of those on board the ship in allowing the plaintiff's cake to be so damaged.

Upon these facts the question arises whether the plaintiff can maintain an action against the defendant for the damage to his goods, or whether the defendant is protected by the exemptions in the bill of lading upon which the action is founded. The bill of lading, so far as is material, is as follows: "Shipped in good order and condition to be delivered, subject to the undermentioned conditions, in like good order and well conditioned, the act of God, Queen's enemies, misfeasance, error in judgment, negligence or default of pilot, master, mariners, engineers, or

(1) 19 Q. B. D. 242.

(2) 22 Q. B. D. 727; 23 Q. B. D. 342.

(3) 12 App. Cas. 484.

(4) 56 New York Rep. (2 Sickel's Rep.) 194.

(5) 54 L. T. Rep. 422.

other persons in the service of the ship, whether in navigating the ship, or otherwise, . . . . . loss or damage arising from insufficiency in strength of packages, from sweating, leakage, breakage, rain, spray, rust, decay from storage or contact with other goods, or from the boiler's steam or machinery, or from the consequences of any damage or injury thereto, . . . . . and all and every the dangers and accidents of the seas, land, and rivers, and of navigation of whatever kind, being excepted, and the ship not being liable for any consequences of the causes herein excepted, however caused or originated." Under the bill of lading, the shipowner became bound to deliver the goods at the port of discharge in like good order and condition as when shipped, unless absolved by any of the excepted exemptions. My brother Charles, who tried this case, gave judgment for the plaintiff, being of opinion that, inasmuch as the jury had found that the rain, or the contact with other wet goods, which damaged the plaintiff's goods, was permitted by reason of the negligence of those for whose acts the defendant was responsible, the defendant was not exempted from liability by the terms of the bill of lading. In my judgment there was ample evidence to support the finding of the jury that the damage was occasioned by the negligence of those for whom the plaintiff was responsible.

It has been held that in construing a clause in a bill of lading exempting a shipowner from liability, which clause is ambiguous and of doubtful meaning, the construction most in favour of the shipper, and not such as is most in favour of the shipowner for whose benefit the exemptions are framed, is to be applied: See per Lush, J., in *Taylor* v. *Liverpool and Great Western Steam Co.* (1); and per Bowen, L.J., in *Burton* v. *English.* (2) I do not understand this to mean that the true canon of construction is not to be applied, but that, when applied, if ambiguity or doubt still exists, the construction is to be in favour of the shipper rather than of the shipowner. In this bill of lading the shipowner has exempted himself from damage to the shipper's goods by reason of rain or of contact with other goods. This is not disputed, but the shipper contended that this exception does not

(1) Law Rep. 9 Q. B. 546, at p. 549. (2) 12 Q. B. D. 218, at p. 224.

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A. L. Smith, J.

apply, first, to damage done before the voyage has actually commenced, and secondly, that it does not apply when the damage is brought about by the negligence of those for whose acts the defendant is responsible. As regards the first point, I do not agree with it. In my judgment, when once a shipowner has received a shipper's goods on board, and has by his captain given a bill of lading in the ordinary form for them, he is bound to deliver them at the port of discharge in the like good order and condition as when shipped, except he is exempted by exemptions contained in the bill of lading, and it is immaterial when the voyage in fact commences. The case of *Hayn* v. *Culliford* (1) was cited to support the first contention, but in my opinion it does nothing of the kind. In that case the bill of lading exempted the shipowner "from any act, neglect, or default whatever of the pilot, master, or mariners, in navigating the ship," and it was held in the Court of Appeal that this clause did not exempt the shipowner from the default of their other agents and servants, and, consequently, not from the acts and defaults of the stevedore: see the judgment of Bramwell, L.J., at p. 185. This is all that case decided in the Court of Appeal. I desire to point out the difference between the bill of lading in the present case and in *Hayn* v. *Culliford.* (1) In the present case the words "engineers or other persons in the service of the ship," after the words "pilot, master, or mariners," were added, as it seems to me, expressly to meet the point taken successfully by the shipper in that case; and it also appears to me that the phrase, "whether in navigating the ship or otherwise," was inserted to meet a point also taken in that case, but expressly left undecided by the Court of Appeal, namely, whether damage to goods in stowing them was damage done in "navigating the ship," which my brother Denman, in the Court below, had held not to be so. Moreover, upon the facts of this case, the whole of the damage done to the plaintiff's goods was after they had been safely stowed in the defendant's ship, and not in the process of stowing, as in *Hayn* v. *Culliford.* (1) In my judgment the shipowner under this bill of lading is, primâ facie, exempted from liability for damage by rain, or by contact with other goods, after the goods have been

(1) 3 C. P. D. 410; 4 C. P. D. 182.

shipped, whether the ship had started on her voyage or not. I now come to the other contention of the shipper, namely, that if the defendant's servants have brought about the rain or contact damage by their negligence, the simple exception of liability from damage by rain or by contact with other goods would not exempt them. In this I agree; but it is answered by the shipowner that he is exempt by reason of the further exception in this bill of lading, namely, "negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship, or otherwise, always excepted." It is upon the construction of these words, "whether in navigating the ship or otherwise," that the decision of this case really depends. Mr. Kennedy says that the words, "or otherwise," may mean two things: (*a*) either something akin to navigating the ship, or (*b*) something dissimilar to it, and that being so, under the rule laid down in the cases above cited, he asserts that they must be construed in favour of the shipper, and, consequently, held to mean something akin to navigating the ship. He was unable, when pressed, to give any intelligible instance of what came under the terms "akin to navigating the ship" which was not covered by the words "in navigating the ship." To read the words "or otherwise" as meaning akin to navigating the ship is to give no meaning, in my judgment, to the preceding words, "in navigating the ship." It should be noticed that they are not words enumerating a class with general words following, to which the doctrine of limiting the general words to the class is ordinarily applied. To read the words "or otherwise" as including everything besides navigating the ship is to render the words "in navigating the ship" inoperative; but to read the words, "whether in navigating the ship or otherwise," as meaning an absolution from liability to damage brought about whether in negligently navigating the ship, or in negligently bringing about those other losses or damages from which the shipowner has exempted himself in the bill of lading, is, in my judgment, the true reading of this bill of lading. By this means the true canon of construction is followed. The natural meaning is given to the words; a meaning is given to every word; and no word is rendered inoperative. When this is done there is no

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A. L. Smith, J.

ambiguity or doubtful meaning. The shipowner, by the bill of lading, contracts to carry and deliver the shipper's goods in like good order and condition as when shipped, excepting that he will not be liable for damage thereto brought about by the negligent navigation of his ship, or for any of the losses and damages excepted in the bill of lading, even though brought about by the negligence of those for whose acts he is responsible. It is unnecessary to determine in this case whether the damage accrued to the plaintiff's goods whilst the ship was, or was not, being navigated. Our attention was called to a decision given in Australia in the case of *Ah Kong* v. *Australian Steam Navigation Co.* (1), in which it was held, upon demurrer, that the words in a bill of lading, "or under any other circumstances," following the general words, "restraint of princes or rulers, accident, loss or damage from any act, neglect, or default whatsoever of the pilot, master, or mariner, or other servants of the company in navigating the ship," did not cover the confiscation of the plaintiff's goods at a foreign port by reason of the omission of the master to insert an entry of them in the ship's manifest, as required by the law of the port—a matter wholly dissimilar from any of the exceptions in the bill of lading, and in no way excepted therein, as, in the present case, the damage by rain and contact is. In my opinion this fact distinguishes that case from the present, and I see no reason to dispute its accuracy, even if it were binding upon us, which it is not.

In my judgment the defendant in this case is exempted under the terms of the bill of lading from the liability sought to be imposed upon him, and judgment should be entered for the defendant with costs.

CAVE and VAUGHAN WILLIAMS, JJ., concurred in this judgment.

*Judgment for the defendant.*

Solicitors for the defendant: *W. A. Crump & Son.*

Solicitors for the plaintiff: *Wynne, Holme, & Wynne, for Forshaw & Hawkins, Liverpool.*

W. A.

(1) 9 Victorian Law Rep. 171.

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*July 8.*

## BASS & ANOTHER *v.* GREGORY.

*Easement—Air—Prescription—Right to Passage of Air through defined Channel.*

The cellar of the plaintiffs' public-house was ventilated by means of a shaft cut therefrom through the rock into a disused well situated in an adjoining yard, owned and occupied by the defendant, the air from the cellar passing through the shaft and out at the top of the well. The cellar had been so ventilated for forty years at least, without interruption, and with the knowledge of the occupiers of the yard:—

*Held*, that the plaintiffs could legally claim, as against the defendant, the easement of the free passage of air from the cellar; and that a lost grant of the right ought to be inferred.

TRIAL before Pollock, B., at the Nottingham spring assizes, 1890.

The facts proved at the trial, and the arguments of counsel, are stated in the judgment.

*Buszard, Q.C.*, and *Appleton*, for the plaintiffs.

*Harris, Q.C.*, and *Stanger*, for the defendant.

*Cur. adv. vult.*

July 8. POLLOCK, B. This case was tried before me at the last spring assizes at Nottingham. The plaintiffs were the owners in fee, and her tenant, of a public-house called the Jolly Anglers, and the defendant was the owner of some cottages and a yard adjoining the plaintiffs' premises. The plaintiffs claimed to be entitled as of right to have the cellar of that public-house ventilated by means of a hole or shaft cut therefrom through the rock into an old well situated in the yard which was occupied by the defendant. The statement of claim then alleged that the plaintiffs claimed this right by uninterrupted user and enjoyment thereof from time immemorial; by the like user and enjoyment for a period of fifty years and upwards next before the commencement of the action; also under the Prescription Act (2 & 3 Wm. 4, c. 71), s. 2, and by lost grant. There was a further allegation that the plaintiffs were entitled by express grant, but no evidence of any express grant which would meet the case was given. The plaintiffs further alleged that the defendant wrongfully removed a grating which was formerly placed across the

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mouth of the well, so as to stop or prevent the free passage of air from their cellar upwards through the well, and they asked for an injunction and damages. There was a counter-claim by the defendant in respect of the trespass by the plaintiffs upon his premises, but nothing turns upon that counter-claim. The first question is whether the plaintiffs established their case in point of fact. It was fairly and pertinently urged by the counsel for the defendant that this was a case so novel in character, and so peculiar, that no judge or jury ought to presume the existence of such a right. One must, however, look at the surrounding circumstances of this particular case, and those who know Nottingham are perfectly well aware that a great many of these chambers have been excavated from the rock, instead of building in the ordinary way. In the present case there is no doubt that for very many years, before the memory of man, this had been an excavated cellar. It was obvious that, without some ventilation, the cellar could not be used; and it was equally clear that it had been used for a particular purpose in the process of brewing, which, without ventilation, could not be carried on. I think, therefore, that the comment upon the novelty and peculiarity of the claim has not, when you know the surrounding circumstances, the value which it was sought to attribute to it. I find, in fact, that for many years—certainly for forty years—there has been a communication between the plaintiffs' cellar and the old well; and by means of that communication the air, some of it impregnated by the brewing operations, has passed from the cellar into the well through the hole or shaft which formed the communication, and upwards through the grating at the top of the well into the open air; so that the well became the ventilating shaft for the cellar. I also find that that state of things was known to the defendant, and to those before him who occupied the yard in which the old well was. Upon the evidence given at the trial it was impossible, to my mind, to suppose that the air, especially when impregnated by the brewing operations, could have passed up the well and out into the open air without it being known to the person, whoever he might be, occupying the yard. Those being my findings in fact, it becomes necessary to consider the law applicable to them. It was argued for the defendant that no such right as that claimed in this case could exist at law, and in

support of that proposition the case of *Bryant* v. *Lefevre* (1) was cited. I do not think that case has any application. There the plaintiff and defendant occupied adjoining premises, and the plaintiff's complaint was that the defendant, in rebuilding his house, carried up the building beyond its former height, and so checked the access of the draught of air to the plaintiff's chimneys. Lord Coleridge, C.J., at nisi prius, gave judgment for the plaintiff, but the Court of Appeal, upon the authority of *Webb* v. *Bird* (2), held that the right claimed could not exist at law, and that the principle laid down in *Chasemore* v. *Richards* (3) (a case decided with respect to the right to the flow of water) applied. The view of the Court was that no man could dictate to his neighbour how he should build his house with respect to the general current of air common to all mankind. It was thought that no such right could by the English law be successfully asserted; and it was said that no such right ever had been successfully asserted in this country. There are many reasons, which I need not now go into, for supporting that principle as a sound principle of law; but it does not apply to the present case, because if ever there was a case of the access of air to premises through a strictly defined channel this is that case. In *Gale* v. *Abbot* (4) and *Dent* v. *Auction Mart Co.* (5) injunctions were granted to remove and prevent impediments to ventilation. In both cases the right claimed was very much of the same nature as the right claimed here. In both cases it was held, after great consideration, that the right was one known to the English law, which could protect it by injunction. I do not, therefore, find any difficulty in holding, not only that in point of fact the plaintiffs proved their case, but that the case was proved establishing a legal right.

It was said for the defendant that, assuming such a right could exist at law, the Prescription Act did not apply to it, and that upon the evidence a lost grant ought not to be presumed. In *Webb* v. *Bird* (6) Erle, C.J., expressed an opinion that the second section of the Prescription Act only applied to rights of way and of water. If it were necessary for me to decide that point, I

(1) 4 C. P. D. 172.
(2) 10 C. B. (N.S.) 268; 13 C. B. (N.S.) 841.
(3) 7 H. L. C. 349.
(4) 8 Jur. (N.S.) 987.
(5) Law Rep. 2 Eq. 238.
(6) 10 C. B. (N.S.) 268, at p. 282.

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should certainly prefer to adopt Lord Selborne's view in *Dalton* v. *Angus*. (1) But it is not necessary, because the plaintiffs have also claimed to be entitled by lost grant. Now, although a good deal has been said from time to time against the doctrine of lost grant, yet almost all civilized countries have adopted it. That doctrine amounts in substance to this: that if a legal right is proved to have existed and been exercised for a number of years the law ought to presume that it had a legal origin. Perhaps the doctrine has best been stated by Parke, B., in *Bright* v. *Walker* (2), who says, at page 217: "For a series of years prior to the passing of this Act (the Prescription Act) judges had been in the habit, for the furtherance of justice and the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years, by analogy to the Statute of Limitations. Such presumption did not always proceed on a belief that the thing presumed had actually taken place; but, as is properly said by Mr. Starkie in his treatise on Evidence, a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation." That rule has been acted upon for very many years, and was recognized both in the Court of Appeal and in the House of Lords in *Dalton* v. *Angus*. (3) I am of opinion that the Court ought to presume a lost grant here, and I know no case in which the doctrine could be more properly applied, because it is impossible to suppose that the precise history of two adjoining tenements such as these should have been preserved. One must look at the state of things existing for a series of years, and then see what is the fair presumption where a person allows an easement of this kind to grow up to the benefit of his neighbour's land and the detriment of his own. I am of opinion, therefore, that the plaintiffs have properly stated their case, and that they have proved a legal right to the relief which they claim.

*Judgment for the plaintiffs for an injunction and damages, and dismissing the counter-claim.*

Solicitors for plaintiffs: *Parr & Butlin, Nottingham.*
Solicitor for defendant: *Parsons, Nottingham.*

(1) 6 App. Cas. 740, at p. 798. (2) 1 Cr. M. & R. 211.
(3) 3 Q. B. D. 85; 6 App. Cas. 740. W. A.

[IN THE COURT OF APPEAL.]

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*July* 23.

CULLERNE *v.* THE LONDON AND SUBURBAN GENERAL PERMANENT BUILDING SOCIETY.

*Company—Directors acting ultrà vires—Liability for Acts of co-Directors—Building Society—Advances on Security of Shares—Building Societies Act,* 1874 (37 & 38 *Vict. c.* 42).

The directors of a building society passed a resolution authorizing advances to members on the security of their shares. The plaintiff, who was a director, concurred in this resolution. An advance was accordingly made to a member on the security of his shares, and the society thereby incurred a loss. The plaintiff was no party to making this advance. In an action by the plaintiff to recover from the society deposits made by him, the defendants counter-claimed in respect of the loss which they had incurred, on the ground that the advance was ultrà vires, and was attributable to the illegal resolution which authorized such advances:—

*Held*, that the plaintiff was not liable, for the cause of the loss was the wrongful act of the directors who made the advance, who were not the servants or agents of the plaintiff, and for whose acts the plaintiff was not liable.

*Pickering* v. *Stephenson* (Law Rep. 14 Eq. 322) commented on.

APPEAL from a judgment of Mathew, J.

The action was brought to recover a sum of money which the plaintiff had deposited with the defendant society, who counter-claimed in respect of certain sums of money which it was alleged had been lost to the society, of which the plaintiff was a director, by being improperly advanced to members upon the security of deposits of certificates of their shares. There was also a counter-claim to recover damages for a loss which the society incurred, which was alleged to be due to the negligence of the plaintiff in making an advance out of the funds of the society on insufficient mortgage security. The claim was not disputed, and the only question was as to the liability of the plaintiff on the counter-claim.

The defendant society was registered under the Building Society Act, 6 & 7 Wm. 4, c. 32, and the rules were certified by the registrar. The society was also registered under the Building Societies Act, 1874. By the rules, the object of the society was declared to be to raise by the subscriptions of its members, and in shares of 50*l.* each, payable by monthly instalments of 10*s.* per share, a fund, out of which each member should

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receive the amount or value of his share for the erection, or purchase, of a dwelling-house or dwelling-houses, or other real or leasehold estate, and rule 8 provided that the funds of the society should be advanced to the members, or invested in such manner, on such terms, and upon such mortgage of freehold, copyhold, or leasehold tenure, as the board should determine. The plaintiff was a director of the society from its formation, and in December, 1876, he was present at a meeting of the board when a resolution was passed that advances should, in future, be made to members, on deposit of their scrip, at the rate of 6 per cent. per annum; and in February, 1883, he was party to a resolution that not more than four-fifths of the amount paid up on any share should in future be advanced. In pursuance of these resolutions advances were from time to time made out of the funds of the society to members on the security of their shares, and losses amounting to 791*l.* were sustained by the society thereby. The plaintiff was not a party to any of the resolutions to make the advances which so resulted in loss to the society. The other ground of counter-claim related to an advance of 500*l.* on the security of some leasehold cottages, on which transaction the society incurred a loss.

The learned judge gave judgment for the plaintiff on the claim and counter-claim. The defendants appealed.

1890. June 19. *Buckley, Q.C.*, and *Theobald*, in support of the appeal. The advances on the security of scrip were unauthorized by the rules or by the Acts. The society are not bound to sue the borrowers, but can call on the directors to replace the money.

[They cited: *In re Railway and General Light Improvement Co.* (1); *In re Oxford Benefit Building and Investment Society* (2); *Evans* v. *Coventry* (3); *Salisbury* v. *Metropolitan Ry. Co.* (4); *Joint Stock Discount Co.* v. *Brown* (5); *Phosphate of Lime Co. v. Green* (6); *Trevor* v. *Whitworth* (7); *Flitcroft's Case.* (8)]

*F. Marshall*, and *T. Marchant Williams, contrà.*

*Cur. adv. vult.*

(1) 28 W. R. 541.
(2) 35 Ch. D. 502.
(3) 8 D. M. & G. 835.
(4) 22 L. T. (N.S.) 839.
(5) Law Rep. 8 Eq. 381.
(6) Law Rep. 7 C. P. 43.
(7) 12 App. Cas. 409.
(8) 21 Ch. D. 519.

July 29, 1890. The judgment of the Court (Lord Esher, M.R., Lindley and Lopes, L.JJ.), was read by

LINDLEY, L.J. In this case the defendant society seeks by a counter-claim to make the plaintiff, one of the directors, responsible for losses which the society has sustained, first by reason of advances made to members on the security of their shares in the society, and, secondly, by reason of advances made on the security of some cottages of insufficient value.

To deal with the last loss first. A sum of 500*l.* was advanced on the security of a mortgage of ten cottages, which were let at rentals considerably greater than the instalments by which the loan and interest had to be repaid. The cottages were inspected by one of the directors of the society, and he reported the security sufficient. But he does not appear to have considered what the houses were worth if put up for sale, and the advance was, no doubt, injudicious. The transaction, however, was clearly intra vires, and was perfectly honest. The most that can be said about it is that there was an error of judgment on the part of the directors. But this is not enough to make them liable for the loss. The learned judge who tried the case acquitted the plaintiff of all culpable negligence in this matter, and I see no reason to differ from him. Indeed, rule 29, indemnifying the directors, is clearly applicable to this part of the case. On this point, therefore, the society fails.

The other loss complained of is of a very different character. The society was formed in 1866 and was registered in 1879 under the Building Societies Act of 1874. The rules of the society were certified to be in conformity with the law by the registrar of building societies. One of those rules, viz., the 8th, is so worded as to admit of more constructions than one, and the directors unfortunately appear to have regarded it as authorizing advances to members on the security of their shares in the society. Accordingly, in December, 1876, a resolution was passed by the directors authorizing such advances, and in February, 1883, another resolution was passed limiting the amount to be advanced to four-fifths of the amount of the borrowing member's shares. The plaintiff concurred in both these resolutions. Advances were accordingly made by the directors to members on

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Lindley, L.J.

no other security than their shares, and the evidence warrants the inference that the plaintiff knew that this was frequently done. The plaintiff, however, was no party to the particular advances mentioned in the counter-claim, and the loss of which is sought to be recovered from him. The learned judge held that he was not responsible for this loss on the ground that no negligence on his part was proved. The society, however, contend that however this may be the plaintiff is responsible for the loss on the ground that the advances were altogether ultrà vires, and are attributable to the illegal resolutions which authorized them.

On looking carefully at the statutes by which these societies are governed, viz., 6 & 7 Wm. 4, c. 32, s. 4, and the previous statutes there referred to, viz., 10 Geo. 4, c. 56, ss. 2, 13, 30 and 31, and 4 & 5 Wm. 4, c. 40, s. 9, it certainly does appear that building societies can only advance money on the security of landed property, freehold, copyhold, or leasehold. The later Act, 37 & 38 Vict. c. 42, ss. 13 and 25, is to the same effect, except that the public funds are added. The 8th rule must be construed with reference to these enactments, and if it authorizes advances on other securities, or on no security, it must to that extent be regarded as contrary to law, and invalid. The resolutions founded upon that rule, and authorizing advances other than on the security mentioned in the statutes, must also be treated as of no validity. No director, therefore, who has in fact advanced money of the society upon any other security than land can avail himself either of the rule or of the resolutions as a defence to an action by the society for the restitution of the money so advanced. Nor does rule 29, relating to the indemnity of the directors, extend to acts which are ultrà vires, and beyond the powers which the society itself could confer upon them. It does not, however, also follow that because the resolutions of December, 1876, and of February, 1883, are contrary to law, and are invalid, the plaintiff is responsible for what other people did on the faith of them. It probably is true that if no such resolutions had been passed no such advances as they authorized would have been made; but the real cause of the loss sustained by the society is the improper advance; the resolution was not the causa

causans of the loss, but only a causa sine quâ non. If the resolution alone had been passed nothing would have happened; it would have had no result. A new wrongful act by independent persons was the real cause of the loss. The resolution, therefore, was not the real cause, not the causa causans. It must be borne in mind that the resolutions in question were not orders given to subordinate officers for them to carry out; the resolutions merely expressed the views of the directors as to their own powers under the society's rules, and their views of what should be done as regards advances. The resolutions no doubt introduced the practice of making advances without proper security; but no one was bound to act in any particular case in conformity with them, and every director ought to have known that the resolutions were ultrà vires. They were bad on the face of them. Everyone acquainted with the statutes would have seen that they were bad without any further inquiry. The plaintiff ought not to have passed the resolutions, and his co-directors ought not to have acted on them. I am not aware of any authority which goes the length of deciding that under these circumstances the plaintiff is liable for what they have done. They were not his servants or agents; their authority was as great as his; their knowledge the same as his; and, even assuming that he misled them upon a point of law, this does not make him liable to the society for the loss of money which they advanced and not he.

The cases to which Mr. Buckley referred do not decide the point now under consideration. In *In re Oxford Benefit Building and Investment Society* (1) the directors declared dividends out of capital, and, in effect, directed the payment of them. They acted on the resolutions they passed, and were held liable for what they did, and not for what they only resolved to do. I have carefully looked at the decree in *Evans* v. *Coventry* (2), and I infer that the directors there held liable not only passed resolutions that were ultrà vires, but also acted on them. The decree as to the increased remuneration of the directors (pp. 844 and 845) only charges each director with what he received. The decree as to dividends paid out of capital (p. 845) appears to me only to charge the directors who declared the dividends, and, in

(1) 35 Ch. D. 502. (2) 8 D. M. & G. 835.

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Lindley, L J

effect, ordered them to be paid. The decree as to the purchase of shares (p 846) only charges those directors who concurred in the purchases, i e., as I understand, who made them or ordered them to be made.

In *Joint Stock Discount Co.* v. *Brown* (1) the directors who were held liable had done much more than the plaintiff did in this case. They were all parties to what James, V.C., characterised as the fatal resolution, that the shares improperly bought should not be sold for less than a certain sum. They were thereby implicated in the whole transaction which produced the loss.

In *Salisbury* v. *Metropolitan Ry. Co.* (2) directors were held liable to make good dividends wrongly paid out of capital; but the point which has to be considered in the present case did not arise there.

Reliance was placed by the counsel for the plaintiff on the judgment of Wickens, V.C., in *Pickering* v. *Stephenson* (3), followed in *Studdert* v. *Grosvenor.* (4) But if a director acting ultrà vires, i.e., not only beyond his own power, but also beyond any power the company can confer upon him, parts with money of the company, I fail to see on what principle the fact that he acted bonâ fide and with the approval of a majority of the shareholders can avail him as a defence to an action by the company to compel him to replace the money. I never could understand that part of the Vice-Chancellor's judgment; nor can I understand it now—I think he was wrong.

For the reasons stated I am of opinion that the plaintiff is not liable, and that the appeal ought to be dismisssd with costs.

The Master of the Rolls and my brother Lopes concur in this judgment.

*Appeal dismissed.*

Solicitors for the plaintiff: *Minshalls, Parry-Jones & Co.*
Solicitors for the defendant: *Whitehouse & Etherington.*

(1) Law Rep. 8 Eq. 381.
(2) 22 L T. (N S) 839.
(3) Law Rep. 14 Eq 322.
(4) 33 Ch. D. 528.

A M.

## GORDON v. SILBER.

1890
Aug. 9.

*Innkeeper—Lien on Goods of Guest—Credit given to Husband—Lien on separate Property of Wife.*

The defendants, husband and wife, stayed at the plaintiffs' hotel; the wife had with her a quantity of luggage, which was her separate property; credit was given to the husband, who made payments on account. The balance of the plaintiffs' bill not being paid, the plaintiffs detained the wife's luggage in the alleged exercise of their right of lien:—

*Held*, that the plaintiffs were entitled to a lien upon the goods, notwithstanding that they were the separate property of the wife.

ACTION tried by Lopes, L.J., without a jury.

The facts are set out at length in the judgment.

*J. Eldon Bankes*, and *Lewis Thomas*, for the plaintiffs.

*Paget*, for the defendants.

Aug. 9. The following written judgment was delivered by

LOPES, L.J. This is an interesting and important case, and raises a question which could not have arisen before the Married Women's Property Act, 1882. The claim is made by the plaintiffs, the proprietors of the Hôtel Métropole, against Mr. Martin Silber and his wife, Lady Lucy, to recover 340*l.* 4*s.* 1*d.*, the balance of a hotel bill. Lady Lucy has separate property, and the claim is made against her on that ground. The separate property is admitted. Mr. Martin Silber has become insolvent, whence this action.

The facts may be shortly stated thus. Before May, 1889, Mr. Martin Silber had been staying at the Hôtel Métropole by himself and had incurred expenses which he had paid. In May he was joined by his wife; she subsequently left for a fortnight, and then again joined her husband at the Hôtel Métropole; he met her at the station; they came to the hotel with a large quantity of luggage, and were received there, occupying the same rooms which they had previously occupied. They continued to live there together until August 27, when Mr. Martin Silber left, Lady Lucy remaining there until September 4, when she left. Mr. Martin Silber had made payments on account.

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The plaintiffs claimed the balance of the bill from Lady Lucy, and sought to make her separate property liable. I was of opinion that their claim could not be sustained against Lady Lucy, on the ground that Mr. Martin Silber was the contracting party, to whom credit (as Mr. Hollands, the proprietor, candidly admitted) had been given. But the separate property of Lady Lucy in the shape of trunks, boxes, and their contents had been detained by the plaintiffs as and for their lien in respect of the unpaid balance, and the return of this separate property was claimed by Lady Lucy in her counter-claim. This raises the important question in this case.

The question is, were the plaintiffs entitled to retain these last-mentioned goods of Lady Lucy? They were unquestionably her separate property, but were brought into the hotel and there received by the plaintiffs at the time when Mr. Martin Silber with his wife became the guests of the plaintiffs. The plaintiffs as innkeepers were bound to receive the defendants and their goods, and were bound, so long as the defendants remained guests at the hotel, to keep safely and securely their goods; and the plaintiffs would have been liable in damages if these goods had been lost. How did the plaintiffs receive them? They knew of no distinction between the goods of the husband and wife, and could not inquire into their respective titles to the goods. They received them as the goods of Mr. Martin Silber and his wife, who became their guests. Suppose Mr. Martin Silber had stolen the goods, still if the plaintiffs received them with their guests the lien would have attached.

By the common law of England every person who keeps a common inn is under an obligation to receive and afford proper entertainment to every one who offers himself as a guest, if there be sufficient room for him in the inn, and no good reason for refusing him. The innkeeper is under an obligation to keep the goods of a guest received into the inn safely and securely, and can be sued and made liable in damages if he fails in this respect. As a compensation for the burden thus imposed upon him, the law has given him a lien upon the goods of the guest until he discharges the expenses of his lodging and food. If the guest has brought goods to the inn to which he has no title,

this will not deprive the innkeeper of his lien, because he is obliged to receive the guest without inquiries as to his title. (1) It seems, therefore, that the lien is commensurate with the obligation to receive the guests and to keep safely and securely his goods. The right of lien of an innkeeper depends upon the fact that the goods came into his possession, in his character of innkeeper, as belonging to a guest: *Smith* v. *Dearlove*. (2) The guests received in this case were Mr. Martin Silber and his wife, and all the goods received by the innkeeper were received as the goods of Mr. Martin Silber and his wife. They brought the goods to the hotel. If Mr. Martin Silber had stolen the goods, the lien, as I have said, would have attached. Can it be said that it is not to attach because some of the goods happen to be the separate property of his wife, who was received as his wife with him as a guest? Husband and wife arrive at an hotel with luggage; the innkeeper has no power of discriminating what may be the property of the husband and what may be the property of the wife; he receives, and is bound to receive husband and wife with their luggage; the innkeeper's charges are not paid, and I cannot see how it can be successfully contended that the lien does not attach. It would, in many cases, be defeating the innkeeper's lien and the object for which it was given. The plaintiffs, therefore, fail as to their claim against the female defendant, but succeed as to her counter-claim, and there will be judgment for the defendant on the claim, and for the plaintiffs on the counter-claim.

Solicitors for plaintiffs: *Ingram, Harrison, & Ingram.*
Solicitors for defendants: *Arnold & Henry White.*

(1) See *Snead* v. *Watkins*, 1 C. B. (N.S) 267; 26 L. J. (C.P.) 57.
(2) 6 C. B. 132.

W. J B.

1890
July 9.

[IN THE COURT OF APPEAL.]

MARKS *v.* BEYFUS.

*Evidence—Witness—Refusal to disclose Nature or Source of Information—Director of Public Prosecutions—Prosecution of Offences Acts,* 1879 *and* 1884 (42 *&* 43 *Vict. c.* 22; 47 *&* 48 *Vict. c.* 58).

A prosecution instituted or carried on by the Director of Public Prosecutions is a public prosecution, and the Director of Public Prosecutions, if called as a witness at the trial or during any proceedings arising out of the trial, is entitled to refuse to disclose the names of persons from whom he has received information and the nature of the information received, unless upon the trial of a prisoner the judge is of opinion that the disclosure of the name of the informant, or of the nature of the information, is necessary or desirable in order to shew the prisoner's innocence.

APPEAL from a decision of the Queen's Bench Division (Lord Coleridge, C.J., and Mathew, J.), refusing a new trial.

The action was brought against several defendants for maliciously and without reasonable and probable cause conspiring to institute and instituting a prosecution for fraud against the plaintiff, upon the trial of which he was acquitted; alternatively the defendants were charged with conspiring to cause the Director of Public Prosecutions to institute the prosecution. There was a further charge that the defendants had conspired by false representations to induce the plaintiff's surety to withdraw his bail and surrender him into custody; but as this part of the case involved no question of law it is unnecessary to allude further to it in this report. At the trial before Huddleston, B., and a special jury, the plaintiff, who conducted his case in person, put in the sworn information of the defendant, Alfred Beyfus (1), which had been used upon the application for a summons against the plaintiff, and also put in the depositions taken before the magistrate upon which the plaintiff had been committed for trial. The plaintiff then called the Director of Public Prosecutions, who, in answer to questions put to him by the plaintiff, said that the prosecution had been instituted by himself and not by the defend-

(1) It was stated during the argument that the prosecution had been instituted by the Director of Public Prosecutions before this information had been sworn.

ants, and that he had a statement in writing which had been supplied to him, but declined, on grounds of public policy, to give the names of his informants or to produce the written statement; he offered, however, to answer the questions if the learned judge was of opinion that they were such questions as ought to be answered; but Huddleston, B., refused to order him to answer the questions or to produce the statement, and, no other evidence being produced on behalf of the plaintiff, he was nonsuited.

The Divisional Court refused a new trial, and the plaintiff appealed.

*The plaintiff in person.* The prosecution was not a public prosecution, but a private prosecution instituted or instigated by private persons for their own ends, and no question of public policy therefore arose. The Director of Public Prosecutions relied on the cases of *Attorney-General* v. *Briant* (1); *Rex* v. *Hardy* (2), and *Rex* v. *Watson* (3), as justifying his refusal to give the names of his informants; but the first of those cases was an information for defrauding the public revenue, and the others were trials for high treason; those were all strictly public prosecutions, in which questions of public policy would arise. The present case is not distinguishable from *Reg.* v. *Richardson* (4), where a policeman was ordered to disclose the sources of his information. In any event, the judge at the trial ought to have inquired into the nature of the statements made to the Director of Public Prosecutions, and then to have exercised his discretion as to ordering the questions to be answered.

*Cock, Q.C., Winch, Q.C.,* and *Henry Kisch,* for the defendants, were not called upon.

LORD ESHER, M.R. As to the first cause of action, I think the plaintiff was bound to prove that the defendants, or two of them, conspired together to institute the prosecution themselves, and did institute it, or that they conspired together to instigate the Director of Public Prosecutions to institute the prosecution, and that he did so. I think that the plaintiff has failed to shew that the defendants, or two of them, conspired together to make a

(1) 15 M. & W. 169.
(2) 24 St. Tr. 199.
(3) 32 St. Tr. 100.
(4) 3 F. & F. 693.

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false charge with the view of putting either the magistrate or the Director of Public Prosecutions in motion. He says that the defendants gave false evidence; but that charge rests merely on the fact that they actually did give evidence. The utmost he gets, assuming everything in his favour, is that each of the defendants knew his evidence to be false; but that is not conspiracy. Then, if the defendants did conspire to give false evidence, that is not enough; they must also in pursuance of the conspiracy have instituted the prosecution, or instigated the Director of Public Prosecutions to do so. Was there evidence of such institution or instigation? It has been pointed out by Bowen, L.J., during the argument, that if the Director of Public Prosecutions had not been called by the plaintiff as a witness, the fact that the defendants, or one of them, had sworn an information against the plaintiff might have been evidence that they instituted or instigated the prosecution; but the effect of that piece of evidence is entirely cancelled by the evidence of the Director of Public Prosecutions, who said that he instituted the prosecution. The director was then asked by the plaintiff who it was that gave him the information upon which he acted; but he declined to answer the question, and was supported in his refusal by the judge. We must take it, therefore, that the defendants did not institute the prosecution, but the Director of Public Prosecutions did; and, assuming a conspiracy on the part of the defendants to institute the prosecution themselves, it would be conspiracy without any result, and not actionable. Did the defendants, however, conspire to instigate the Director of Public Prosecutions to institute a prosecution against the plaintiff, and did they as a fact procure him to do so? Unless the Director says that the defendants asked him to institute the prosecution, there would, even if the conspiracy to do so were proved, be no evidence that they procured him to prosecute. The case as it is presented to us therefore depends wholly on whether the Director of Public Prosecutions ought to have been allowed by the judge at the trial to answer the questions put to him.

The ground taken on behalf of the Director of Public Prosecutions is that this was a public prosecution, ordered by the

Government (or by an official equivalent to the Government) for what was considered to be a public object, and that therefore the information ought not on grounds of public policy to be disclosed. The question whether this was a public prosecution in this sense depends upon the true construction of the statutes by which the office of Director of Public Prosecutions was created, and we have to say whether, when that officer acts under the rules ordinarily regulating his duties or under the direction of the Attorney-General, the case is put in the category of public prosecutions instituted by the Government for the public protection.

The Director of Public Prosecutions was first appointed under 42 & 43 Vict. c. 22, and his power to institute criminal proceedings is subject to the conditions imposed on him by s. 2 of that Act. To see what is the nature of prosecutions instituted by him, whether there is not something which distinguishes them from other prosecutions, it is only necessary to turn to s. 7, which provides that the Act is not to interfere with the right of any person to institute a criminal proceeding, and further, that where a prosecution is undertaken by the Director of Public Prosecutions, it shall not be necessary to bind over any person to prosecute, and that if any person has been bound over, he shall, upon the Director of Public Prosecutions undertaking the case, be released from his obligation. By that section, therefore, a prosecution instituted or undertaken by the Director of Public Prosecutions is dissociated from and placed in contrast with an ordinary prosecution, which, although nominally undertaken in the name of the Queen, is in reality undertaken by a private person, and the Director is placed in a different position from a private prosecutor. The regulations made under this Act shew in what cases he is to act when he is not acting directly under the orders of the Secretary of State or of the Attorney-General. He is to undertake a prosecution where the offence is punishable with death; where it is of a class the prosecution of which has hitherto been undertaken by the solicitor of the Treasury; and also "where it appears to the Director that the offence or the circumstances of its commission is or are of such a character that a prosecution thereof is required in the public interest, and that owing to the importance or difficulty of the case or to other

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circumstances the action of the Director of Public Prosecutions is necessary to secure the due prosecution of the offender." This is language which seems to put the Director of Public Prosecutions in a different position from that of a private prosecutor; he is in the position which a person authorized by the Government in former days would have been in—that is to say, a prosecution instituted or conducted by him is a public as distinguished from a private prosecution.

What, then, is the rule as to the disclosure of the names of informants, and the information given by them in the case of a public prosecution? In the case of *Attorney General* v. *Briant* (1), Pollock, C.B., discussing the case of *Rex* v. *Hardy* (2), says that on all hands it was agreed in that case that the informer, in the case of a public prosecution, should not be disclosed; and later on in his judgment, Pollock, C.B., says: "The rule clearly established and acted on is this, that in a public prosecution a witness cannot be asked such questions as will disclose the informer, if he be a third person . . . and we think the principle of the rule applies to the case where a witness is asked if he himself is the informer." Now, this rule as to public prosecutions was founded on grounds of public policy, and if this prosecution was a public prosecution the rule attaches; I think it was a public prosecution, and that the rule applies. I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not. The learned judge was, therefore, perfectly right in the present case in applying the law, and in declining to let the witness answer the questions. The result of his so deciding was, of course, that the plaintiff's cause of

(1) 15 M. & W. 169. (2) 24 St. Tr. 199.

action, which was founded on the alleged instigation of the Director of Public Prosecutions by the defendants, failed, for there was no evidence of any such instigation.

I may add that the rule as to non-disclosure of informers applies, in my opinion, not only to the trial of the prisoner, but also to a subsequent civil action between the parties on the ground that the criminal prosecution was maliciously instituted or brought about.

LINDLEY, L.J. I agree. It is obvious that the plaintiff could not hope to succeed in his action without the evidence of the Director of Public Prosecutions, and I am satisfied, for the reasons given by the Master of the Rolls, that the learned judge at the trial was perfectly right in the course he took.

BOWEN, L.J. I am of the same opinion. As to the first cause of action, the same law is applicable, whether the charge against the defendants is that of conspiring to put the magistrate or the Director of Public Prosecutions in motion; it is the damage wrongfully done to the plaintiff, and not the conspiracy, which is the gist of the action. If the plaintiff cannot shew that either of the parties was put in motion by the defendants, he has no cause of action; that is the crucial point of the case, and it is obvious that the present case broke down because the plaintiff could not shew this. The information of the defendant Beyfus would, it is true, be primâ facie evidence against himself that he had set the magistrate in motion, but the evidence of the Director of Public Prosecutions entirely displaced this primâ facie presumption; without that evidence the plaintiff could not have got to the jury, and upon that evidence he was rightly nonsuited.

Treating the action as one including a conspiracy by the defendants to injure the plaintiff by getting his bail to withdraw and surrender himself into custody, that point is entirely disposed of by the evidence.

The only question which remains for our decision is, whether the Director of Public Prosecutions was right in objecting to answer the questions put to him, and whether the judge was right in saying that on grounds of public policy he ought not to

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be asked to disclose the name of his informant. That depends upon whether this was a public prosecution; if so, then neither upon the criminal trial nor upon any subsequent civil proceedings arising out of it, ought the Director of Public Prosecutions, upon grounds of general policy, to be asked to disclose the name of his informant. The only exception to such a rule would be upon a criminal trial, when the judge if he saw that the strict enforcement of the rule would be likely to cause a miscarriage of justice, might relax it in favorem innocentiæ; if he did not do so, there would be a risk of innocent people being convicted.

What, then, is the position of the Director of Public Prosecutions since 1879? Looking at s. 7 of the Act, and at the rules and regulations made under the statutes, it is obvious that when a prosecution is taken up by him, it is no longer a private, but a public, prosecution within the principle laid down in *Attorney General* v. *Briant* (1), and in my opinion Huddleston, B., was quite right in applying to the present case the rule enunciated by Pollock, C.B., and based on *Rex* v. *Hardy*. (2) I entirely agree that such a matter as this is not one for the exercise of the judge's discretion, but for the application of the law; the privilege does not depend upon the witness claiming it when asked the question; but the judge should refuse to allow the question as soon as it is asked. I desire to add that my opinion is based entirely upon the fact that a prosecution instituted or taken up by the Director of Public Prosecutions is a public prosecution, and that the question whether the Director of Public Prosecutions is an officer of state, and as such entitled to claim privilege for state acts, does not arise in the present case.

LORD ESHER, M.R. I desire to say, so that there shall be no possibility of mistake as to my opinion, that even if the Director of Public Prosecutions had been willing to answer the questions put to him the judge ought not to have allowed him to do so.

*Appeal dismissed.*

Solicitors for defendants: *Beyfus & Beyfus.*

(1) 15 M. & W. 169. (2) 24 St. Tr. 199.

W. J. B.

BENGAL SECRETARIAT LIBRARY

SERRAINO & SONS *v.* CAMPBELL AND OTHERS.

1890
*June* 17;
*July* 1

*Ship—Bill of Lading—Incorporation of Conditions of Charterparty in Bill of Lading.*

Goods were shipped under a charterparty and bill of lading, the bill of lading providing that the goods were to be delivered at the port of discharge, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or to assigns, they paying freight for the said goods, and all other conditions as per charter, with average accustomed." In the charterparty were the following words: "Negligence clause as per Baltic Bill of Lading, 1885." Amongst the perils excepted by the Baltic Bill of Lading, 1885, were "strandings and collisions, and all losses and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners."

Owing to the negligence of the master the ship was stranded, and the goods were thereby lost. The plaintiffs, who were indorsees of the bill of lading but strangers to the charterparty, sued the shipowners for the loss of the goods:—

*Held*, that the words, "all other conditions as per charter," did not incorporate in the bill of lading the exception of "strandings occasioned by the negligence of the master," and that the shipowners were liable.

*Russell* v. *Niemann* (17 C. B. (N.S.) 163) followed.

ACTION tried before Huddleston, B., and a special jury. The facts and arguments sufficiently appear from the judgment.

*Barnes, Q.C., Lawson Walton, Q.C.*, and *C. F. Lowenthal*, for the plaintiffs.

*French, Q.C.*, and *Joseph Walton*, for the defendants.

July 1. HUDDLESTON, B., read the following judgment:—

This was an action brought by the plaintiffs, as indorsees of a bill of lading, and owners of goods entrusted to the defendants, as owners of the vessel *John Banfield*, for delivery at Trapani, in the island of Sicily, shipped by Messrs. Fisher, Renwick & Co., and lost by reason of the negligence and want of skill of the officers and crew in charge of the ship near Mazzara, on the coast of Sicily. The vessel stranded at Mazzara, and the plaintiffs' goods were lost. Witnesses being called, the jury found that the loss was due to the negligence of the master. On this finding

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it was agreed that the jury should be discharged, and that the rest of the case should be decided by me alone. The charterparty, which was in the ordinary form, was described to be by Fisher, Renwick & Co., "as agents for the charterers." It contained, in print, the usual exceptions: "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, during the said voyage"; and, in writing, at the end "Negligence clause as per Baltic Bill of Lading, 1885." It was contended on the part of the defendants, that the plaintiffs were parties to the charterparty, Fisher, Renwick & Co. being their agents, and, therefore, that the plaintiffs, as principals, were bound by all the terms of the charterparty; but if they were not actual parties to the charterparty as principals, they were so to the bill of lading, which it was alleged incorporated all the provisions of the charterparty, including the Baltic Bill of Lading Clause, 1885. Apart from the fact of Fisher, Renwick & Co. describing themselves as agents for the charterers there was no evidence to shew that they were so in fact. The contract between them and the plaintiffs was contained in letters and telegrams discussing the price, and concluded with a letter of December 12, in which Fisher, Renwick & Co. wrote: "Referring to telegrams exchanged between us, we confirm sale to your good selves of a cargo of large Newcastle Steam Coal at 19*s.* 6*d.* per ton c. i. f. Trapani," and the invoice was made out by Fisher, Renwick & Co., as vendors, and the plaintiffs as vendees. I was clearly of opinion that the contract was one of sale and not of agency, and that Fisher, Renwick & Co. were principals in the charterparty, and that the plaintiffs were not parties directly bound by it. It was, however, contended that the bill of lading incorporated all the provisions of the charterparty, and amongst them the Baltic clause. The bill of lading provided that the goods shipped by the *John Banfield*, by Fisher, Renwick & Co., were to be delivered at the port of Trapani, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or to assigns, they paying freight for the said coals, and all other conditions as per charter, with average

accustomed"; and it was argued that the words, "all other conditions as per charter," imported into the bill of lading the Baltic clause. The Baltic clause provided that "strandings and collisions, and all losses and damages caused thereby," were to be excepted, "even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners." I am of opinion that the words "all other conditions" must be connected with the words "paying freight for the coals," and include only such conditions as are ejusdem generis with the payment of freight, importing into the bill of lading so much of the charterparty as is referable to the subject-matter of the discharge and receipt of cargo at the port of discharge, and do not include a clause which would add to the exceptions already recited and very materially alter the contract on the face of the bill of lading. *Russell* v. *Niemann* (1) is directly in point. *Russell* v. *Niemann* (1) was recognised and approved of in the case of *Taylor* v. *Perrin* (2), in the House of Lords, the shorthand writer's judgment in which has been furnished to me, though the case does not seem to have found its way into the regular reports. Lord O'Hagan describes *Russell* v. *Niemann* (1) to be a perfectly well decided case. Lord Blackburn says: "I am clearly of opinion that on the true construction of the bill of lading the reference to the charterparty does not extend the exceptions by adding those that are in the charterparty. The case which has been referred to, *Russell* v. *Niemann* (1), in which Willes, J., gave judgment, as it appears to me perfectly correctly decided that the reference to the charterparty is meant to bring in those conditions which would apply to the person who has taken the bill of lading and is taking delivery of the cargo, such as the payment of demurrage, the payment of freight, the manner of paying, and so on, but is by no means to be taken to incorporate all the conditions of the charterparty."

It was said that Lord Fitzgerald appeared to dissent from that view in the House of Lords; but I do not so read his judgment. He merely says that it was not necessary to discuss it for the decision of the particular case before them.

(1) 17 C. B. (N.S.) 163. (2) Unreported.

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Mr. French argued that *Gray* v. *Carr* (1), and *Porteus* v. *Watney* (2), must be considered to overrule *Russell* v. *Niemann* (3); but in both those cases the conditions imported into the bill of lading were ejusdem generis with those contained in the bill of lading. The other authorities cited, *Gullischen* v. *Stewart* (4), *Gardner* v. *Trechmann* (5), and *Hamilton* v. *Mackie* (6), amount to this: that where there are such words of reference in the bill of lading all the provisions of the charterparty are to be considered as introduced into the bill of lading, and that if then any of those are contradictory to the terms of the bill of lading or insensible, they may be rejected. In this case as the parties have agreed that there should be only certain exceptions mentioned in the bill of lading, the introduction of the Baltic clause would altogether override those exceptions, and therefore be inconsistent with the provisions which in the bill of lading were agreed to by the parties. Under these circumstances, I am of opinion that, the negligence having been proved, the defendants are not exempted from the consequences of that negligence either by the terms of the bill of lading or the charterparty, and that therefore the plaintiff is entitled to a verdict for the amount claimed, 447*l.* 1*s.*

*Judgment for the plaintiffs.*

Solicitors for plaintiffs: *Coote & Ball, for Adamson & Co., North Shields.*

Solicitors for defendants: *Stocken & Jupp.*

(1) Law Rep. 6 Q. B. 522.
(2) 3 Q B. D. 534.
(3) 17 C. B. (N.S) 163.
(4) 11 Q. B. D. 186; and on appeal, 13 Q. B. D. 317.
(5) 15 Q. B. D. 154.
(6) 5 Times L. R. 577.

J. F. C.

[IN THE COURT OF APPEAL.]

1890
*July 4.*

IN RE SKEGG. EX PARTE SKEGG.

*Bankruptcy—Discharge of Bankrupt—Suspension—"Undue Preference" given to a Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 3 (*f*), *s.* 48.

By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 28 (2), and (3) (*f*), the Court shall either refuse the bankrupt an order of discharge, or suspend the operation of the order, or grant an order of discharge subject to conditions, on proof that he has, within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an "undue preference" to any of his creditors.

*Held*, that this section has a wider operation than s. 48, and applies to acts which could not be avoided as "fraudulent preferences" under the latter section.

A debtor had mortgaged his house and premises to three mortgagees in succession, and was in insolvent circumstances. On January 22, the first mortgagee served him with a writ in an action on his covenant to pay the mortgage debt and interest. He did not appear to this writ. On January 24, the second and third mortgagees served him with similar writs, and, on the next day he took these writs to the solicitors of the first mortgagee, and asked them to do what was necessary for him. They entered appearances for him to both the writs. On January 31 the first mortgagee obtained judgment in his action, and on February 7 the sheriff levied execution under this judgment. On February 8 the third mortgagee obtained judgment in his action, and on the same day the sheriff levied execution under this judgment. On March 6 a receiving order was made against the debtor, and he was afterwards adjudicated a bankrupt.

*Held*, that, by taking the writs to the solicitors of the first mortgagee, the bankrupt had given that mortgagee an "undue preference" within the meaning of s. 28.

APPEAL by George Skegg, a bankrupt, against an order made by a registrar suspending the bankrupt's discharge for a period of two and a half years.

The ground of the suspension was, that the bankrupt had been guilty of three of the offences mentioned in sub-s. 3 of s. 28 of the Bankruptcy Act, 1883. The only one of the three which it is material to state for the purposes of the present report is the third, viz.: "That the bankrupt had within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to one of his creditors, viz., The Lion Brewery Company, Limited."

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IN RE SKEGG
EX PARTE SKEGG

The debtor was a licensed victualler, carrying on his business at a public house, called the Henshaw Arms. His interest in the house was subject to three mortgages. The first was to the Lion Brewery Company; the second to a Mr. Proud; and the third to Messrs. Boord, distillers. At the beginning of the year 1890, the mortgagees were pressing the debtor for payment of their debts. On January 28th, 1890, the solicitors of the Lion Company wrote to the second and third mortgagees that, unless the Lion Company were redeemed, they should proceed to enforce their powers under their mortgage. On January 22, the Lion Company served the debtor with a writ for 6565*l.*, the amount of the mortgage debt and interest due to them on his covenant in their mortgage deed, and on January 23, they commenced another action against the debtor for foreclosure of their mortgage. On January 24, the debtor was served with two writs by Proud and Messrs. Boord respectively for the amounts due under his covenants in their respective mortgage deeds. On January 25, the debtor took these two writs to the Lion Company's solicitors, and asked them to do what was necessary for him. They entered appearances for him to both writs. No appearance was entered on his behalf to the Lion Company's writ in the first action, and on January 31 they obtained judgment for default of appearance. They issued a writ of fi. fa. upon the judgment, and on February 7 the sheriff took possession of the debtor's goods. On February 8, Messrs. Boord obtained judgment in their action under Order XIV., and issued a writ of fi. fa., and on the same day the sheriff took possession of the debtor's goods under this writ. On March 6, a receiving order was made against the debtor on the petition of Messrs. Boord, and he was afterwards adjudicated a bankrupt. The goods which the sheriff had seized were sold under an order of the Court of Bankruptcy, and the proceeds of sale were paid to the official receiver, neither of the execution creditors receiving anything. From the report of the official receiver it appeared that, taking into account the mortgage debts, the bankrupt had been in insolvent circumstances for some years. The registrar held that the bankrupt's taking the writs which had been served on him by the second and third mortgagees to the solicitors of

the first mortgagees, and thus giving them notice of those actions, was an "undue preference" of the first mortgagees within the meaning sub-s. 3 (*f*) of s. 28.

*Herbert Reed*, for the bankrupt. The registrar was wrong in holding that the bankrupt had given an "undue preference" to the first mortgagees. He had no defence to their action, and he could not do otherwise than abstain from defending it. He did not confess judgment; that might have been an "undue preference," but he simply allowed things to take their course. If he had vexatiously defended the action, he would have committed another offence under sub-s. 3 (*c*) of s. 28 of the Bankruptcy Act 1883. He did nothing to prefer the first mortgagees, except that he did not enter an appearance to their writ. An "undue preference" under sub-s. 3 (*f*) of s. 28 (1), must be the same thing as a voluntary proceeding under s. 48. The bankrupt has not

(1) Sect. 28, provides by sub-s. 2, that on the hearing of the bankrupt's application for an order of discharge, the Court "shall, on proof of any of the facts hereinafter mentioned, either refuse the order, or suspend the operation of the order for a specified time, or grant an order of discharge subject to" certain conditions.

By sub-s. 3: "The facts hereinbefore referred to, are" (inter alia)

(*a*.) "That the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by him, and as sufficiently disclose his business transactions and financial position within the three years immediately preceding his bankruptcy;

(*b*.) "That the bankrupt has continued to trade after knowing himself to be insolvent."

(*c*.) "That the bankrupt has put any of his creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against him;

(*f*.) "That the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors."

Sect. 48 (1). "Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money, in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors shall, if the person making, taking, paying, or suffering the same is adjudged bankrupt on a bankruptcy petition presented within three months after the date of making, taking, paying, or suffering the same, be deemed fraudulent and void as against the trustee in the bankruptcy."

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done any of the things mentioned in s. 48. It would be very inconvenient to decide that there has been a preference of a creditor in the absence of the creditor who is alleged to have been preferred. The conduct of a bankrupt, apart from any transfer of property, has never been held to be a fraudulent preference. The debtor was harassed by a number of writs, and he took the two writs to the solicitors of the first mortgagees, because he did not know any other solicitors, and he only asked them to do what was necessary for him.

[BOWEN, L.J. If a debtor calls on a creditor, and gives him information, which enables him to obtain priority over another creditor, is not this "giving him an undue preference"?]

It is not "giving" the creditor anything.

The official receiver and the petitioning creditors were served with notice of the appeal, but neither of them appeared to oppose it.

LORD ESHER, M.R. The registrar has suspended the bankrupt's discharge on three grounds, all of which are mentioned in sub-s. 3 of s. 28 of the Bankruptcy Act, 1883. The only one which has been seriously argued is that which is mentioned in sub-s. 3 (*f.*) It is said that the bankrupt has not been guilty of "giving an undue preference" to one of his creditors—the Lion Brewery Company, and that, if the registrar had thought so, he would have suspended the bankrupt's discharge for a shorter time than he has done. In my opinion, the bankrupt has committed the offence mentioned in sub-s. 3. This depends upon the construction of s. 28.

I find the following statement in Mr. Yate Lee's book on Bankruptcy (3rd ed. p. 154): "Sect. 48, provides for the avoidance of preferences in certain cases, commonly called fraudulent preferences. An 'undue preference,' appears to be the same thing." In my opinion, that is not so. Sect. 48 makes certain acts and transactions absolutely void, if they have been done or entered into by a bankrupt with the particular motive or view of giving one creditor a preference over the other creditors. Sect. 28 does not make anything void; it has quite another object. Its

purpose is the consideration by the Court of the conduct of the bankrupt upon the hearing of his application for an order of discharge. One would expect, therefore, that the word "preference" would have different meanings in the two sections. There are many things mentioned in sub-s. 3 of s. 28 which could not possibly be avoided after a bankruptcy. If the bankrupt has omitted to keep proper books of account, or if he has continued to trade after knowing himself to be insolvent, neither of these things can be set aside after it has been done. All the things referred to in sub-s. 3 point to conduct of the bankrupt for the purpose of the Court's dealing with his application for a discharge—things which he has done, and which will induce the Court not to grant him a discharge as readily as if he had not done them. The question which the Court has to consider is, the conduct of the bankrupt, and in considering a man's conduct you must inquire whether what he has done was merely accidental, or whether he acted deliberately, knowing what he was doing. What is the duty of a debtor under the circumstances mentioned in sub-s. 3 (*f*), when he has creditors, and when he is on the eve of bankruptcy, and must know that he is in that position? In my opinion, the only honest course for a man in such a position is, not to interfere in any way between his creditors, so as to give any one of them a preference over the others. He knows that, if he is made a bankrupt, his property will be shared equally by all his creditors, and he ought to let things take their course as they would in a bankruptcy. If a debtor under such circumstances interferes in any way between his creditors, so as to give any one of them a preference over the others, he is, in my opinion, guilty of giving that creditor an "undue preference." Has the present applicant done this? I cannot accept the conclusion that he took the two writs to the solicitors of the Lion Company accidentally, because he did not know of any other solicitors in London. If we were to shut our eyes we might believe that he acted innocently. But, to my mind, it is clear that he took the writs to those solicitors because they were the solicitors of his principal creditors, in order that those creditors might be able to levy execution before the others. I have no doubt that such conduct amounted to giving those creditors an "undue

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preference" within the meaning of sub-s. 3 (*f*). The registrar's decision was, therefore, not too harsh, and the appeal must be dismissed.

LINDLEY, L.J. I am of the same opinion. It is said that the bankrupt has not been guilty of giving an "undue preference" to the Lion Company, and the argument is that the "undue preference" mentioned in sub-s. 3 (*f*) of s. 28 is not more extensive than the fraudulent preference which is dealt with by s. 48. I do not think that argument is well founded. No doubt, sub-s. 3 (*f*) of s. 28 includes everything which is comprised in s. 48, but I think it includes more. The objects of the two sections are different. The object of s. 48 is to set aside and make void certain transactions of a bankrupt in order to preserve his assets for his creditors—in order to prevent his property from being withdrawn from his creditors. The object of s. 28 is entirely different. It is to empower the Court to consider the conduct of the bankrupt, in order that it may determine whether a discharge shall be granted to him. It is the conduct of the bankrupt which the Court has to consider, and, if the Court comes to the conclusion that he has been unduly preferring one of his creditors, though there is no transaction which can be set aside, the Court is enabled to punish him. I think the registrar's decision is quite right.

BOWEN, L.J. I am of the same opinion. It is proved that, at a time when the debtor was insolvent, he gave a notice to his principal creditors which enabled them to obtain a preference over the other creditors. It is clear to me that this conduct of the debtor enabled one creditor to obtain a preference, and any conduct of an insolvent debtor which has that effect is, in my opinion, conduct at which the Court ought to strike. The argument for the bankrupt is, that a man does not, within the meaning of s. 3 (*f*) of s. 28, give an "undue preference" (or an undue advantage, if I may paraphrase the words) to a creditor, unless he does one of the specific acts which are enumerated in s. 48, and are made void by it, if they are done with a view of preferring a creditor. A close examination of the language of

the two sections will shew, I think, that this view cannot be maintained. Sect. 28 deals with the conduct of the bankrupt, and enables the Court to punish him in the manner therein mentioned, if it is proved that he has done any of certain specified things, one of which is, "that the bankrupt has within three months preceding the date of the receiving order, when unable to pay his debts as they become due, given an undue preference to any of his creditors." Sect. 48 enumerates certain transactions, which, it says, are to be avoided, if the bankrupt has entered into them with a view of giving one creditor a preference over the other creditors. The words "fraudulent preference" or "undue preference" are not used in this section. The acts which are enumerated are to be avoided, if they are done with a certain view of preference, but the section does not say that such acts are the only acts by which preference may be shewn. The object of s. 28 is disciplinary—to punish a bankrupt who, knowing that he is insolvent, gives a preference to one of his creditors. The duty of a man who is in insolvent circumstances is, not to prefer one of his creditors over the others. If he does so, it may well be that there has been no completed transaction which would have become void under s. 48, if completed; but the Court can nevertheless under the earlier section punish him for the inchoate act. That is precisely what the registrar has done in this case. In my opinion, his order was quite right, and the appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Nash, Field, & Withers.*

W. L. C.

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*July* 4, 5, 29.

[IN THE COURT OF APPEAL.]

BISHOP AND OTHERS *v.* THE BALKIS CONSOLIDATED COMPANY, LIMITED.

*Company—Sale of Shares—Certification of Transfer—Voucher of Title of Transferor—Estoppel—Act Ultrà Vires—Representation as to Credit or Ability—Lord Tenterden's Act* (9 *Geo.* 4, *c.* 14), *s.* 6.

P., a shareholder in the defendants' company, transferred his shares to a purchaser, and his share certificate was lodged with the company to enable such purchaser to complete his title. P. subsequently purported to transfer a portion of the shares to another purchaser, who again sold, and executed a transfer of the shares to the plaintiff. Such last-mentioned transfer was "certificated" by the defendants' secretary, in the manner usual upon the transfer of shares, by placing upon it the words "certificate lodged," although no certificate was in fact lodged in respect of such transfer; and upon the faith of such "certification" the plaintiff paid the price of the shares. The defendants subsequently refusing to recognise the plaintiff as the owner of the shares, he brought his action to recover their value from the defendants:—

*Held*, that such a "certification" could only be taken to amount to a representation by the defendants that a document or documents had been lodged with them apparently in order, and shewing primâ facie that the transferor was entitled to the shares, i.e., either what purported to be a certificate that he was the registered owner of the shares, or what purported to be a certificate that some one else was such owner, accompanied by a document or documents purporting to transfer the shares from such person to the transferor; but that such "certification" did not import a warranty of the transferor's title or of the validity of such document or documents; that it did not therefore estop the defendants from impugning the plaintiff's title on the ground of the invalidity of the transfer to the plaintiff's transferor: that the plaintiff could not therefore make a title to the shares against the defendants by estoppel; and that, as no action would lie against the defendants for a careless misrepresentation without fraud, the plaintiff could not recover.

So *held*, affirming in the result, the judgment of Vaughan Williams, J., in the Court below (ante, p. 77), but dissenting from the opinion expressed by him that the "certification" was ultrà vires on the part of the company, and that it was a representation as to credit or ability within s. 6 of Lord Tenterden's Act.

APPEAL from the judgment of Vaughan Williams, J., in favour of the defendants.

The facts are fully stated in the report of the case in the Court below (1), but appear sufficiently for the purposes of this report from the judgment.

(1) Ante, p. 77.

July, 4, 5. *Henn Collins, Q.C., W. D. Rawlins,* and *Hugo Young,* for the plaintiffs. The case is governed by *In re Bahia and San Francisco Ry. Co.* (1), which was recognised and approved by the House of Lords in *Société Générale de Paris* v. *Walker.* (2) The "certification" is a representation made by the only persons who can know the fact, i.e, the company, that the certificates of the shares referred to have been deposited with them for the purposes of a transfer, and such representation is made with the intention that on the faith of it the person to whom it is made shall pay money for the shares. The evidence shews that the practice is for the selling broker to go to the company with the transfer of the shares which he has sold and a certificate of of those shares, or of a larger number, and the company then stamp on the transfer a statement that certificates to answer the transfer have been deposited with them. When the transfer with this stamp on it is produced to the buying broker, he is bound to pay the agreed purchase-money. The effect is the same as if the selling broker had produced the certificates of the shares to the buying broker. The representation having been made by the defendants for the purpose of being acted upon by the purchaser of the shares, and it having been so acted upon, the defendants are estopped from now saying that the representation which they then made was not true. The question whether it would be ultrà vires for the company to register the plaintiffs as holders of the shares does not really arise in this action. The observations of Lush, J., in *In re Bahia and San Francisco. Ry. Co.* (1) exactly apply. He said (at p. 598): "The certificate was given by the company to Stocken & Goldner in order that they might use it in the usual way in which such certificates are used, viz., as a voucher to a purchaser of their names being on the register"; and, that being so, he held that the company were estopped from denying, after their statement had been acted on, that Stocken & Goldner were the legal holders of the shares mentioned in the certificates. The argument that such a representation would be ultrà vires would equally have applied in that case; for the representations made by the company there involved an admission by them that two persons were entitled to the same shares. The plaintiffs'

(1) Law Rep. 3 Q. B. 584. (2) 11 App. Cas. at p. 36.

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demand is only that they should be placed in the same pecuniary position, as if it were possible to put them on the register of shareholders. The defence of ultrà vires would be a good answer to an application for a mandamus to the company to put the plaintiffs on the register of shareholders; but it is no answer to a claim for damages founded on the estoppel. *Hart* v. *Frontino and Bolivia, &c., Gold Mining Co.* (1) is an authority to the same effect. In *Simm* v. *Anglo-American Telegraph Co.* (2) Lindley, L.J., pointed out (at p. 193) the distinction between compelling a company to do an ultrà vires act in putting a man on their register in respect of shares standing in the name of another, and ordering them to pay damages for not putting him on. And in the same case Brett, L.J., said (at p. 206) that "an estoppel gives no title to that which is the subject-matter of the estoppel. The estoppel assumes that the reality is contrary to that which the person is estopped from denying, and the estoppel has no effect at all upon the reality of the circumstances."

This is the very point upon which the learned judge below has gone wrong.

[LINDLEY, L.J., referred to *Shaw* v. *The Port Philip Gold Mining Co.* (3)]

That case seems to be inconsistent with the decision of this Court in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (4) The latter case does not apply to the present. In that case the person who made the representation was not in truth authorized by the company to make it, and could not have been authorized by them to make it, because they could not legally have made it themselves. The case did not decide that, if the secretary had made the statement for the benefit of the company, they would not have been answerable for it.

Lord Tenterden's Act does not apply to such a representation as that which was made by the "certification."

[BOWEN, L.J., referred to *Swift* v. *Jewsbury* (5), in which it was held that an action could not be maintained under Lord Tenterden's Act in respect of a representation made by an agent.]

(1) Law Rep. 5 Ex. 111.
(2) 5 Q. B. D. 188.
(3) 13 Q. B. D. 103.
(4) 18 Q. B. D. 714.
(5) Law Rep. 9 Q. B. 301.

*Swann* v. *Phillips* (1), upon which the learned judge relied, was decided upon demurrer, and the question was, what the words in the declaration meant.

There is no reason in principle why a company should not be bound by a representation made by them, even though it is not made under seal: see the judgment of James, L.J., in *In re British Farmer's Pure Linseed Cake Co.* (2)

*Sir H. Davey, Q.C., Greene, Q.C.*, and *A. T. Lawrence*, for the defendants. The present case is concluded against the plaintiffs by the decision in *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3), when it is rightly understood. The principle of that decision was, that neither by contract nor by estoppel can a company be compelled to do that which is ultrà vires. It is in no way inconsistent with *In re Bahia and San Francisco Ry Co.* (4), in which no such difficulty arose. Looking at the matter on principle, why should a company be bound by estoppel? A company is a legal corporation with certain strictly defined powers. It is difficult to see how they can be bound by estoppel to do that which they could not contract to do. A contract to increase their capital beyond the authorized amount would be illegal, and therefore void. How can they be held to have recognised a non-existing title, which they could not have created? In *British Mutual Banking Co.* v. *Charnwood Forest Ry. Co.* (3) the question was, how far a company could be bound by a representation made by one of its officers, and the principle laid down by the Court was, that, in order that the company should be bound, the officer must have been acting for the benefit of the company. In that case, though the secretary was the proper person to give the information, and he professed to answer the question put to him as secretary of the company, yet, in making the statement which he did make, he was acting in his own interest, not in that of the company, and therefore the company were not bound by his act. In the present case the shares to which the "certification" applied were as much non-existent as was the debenture stock in that case, because Powter had already transferred them to Balfour, who was the registered owner, and

(1) 8 A. & E. 457.
(2) 7 Ch. D. at p. 538.
(3) 18 Q. B. D 714.
(4) Law Rep. 3 Q. B. 584.

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it was as much ultrà vires for the company to recognise their existence as belonging to any one else as it was for the company in the *Charnwood Forest Railway Company's Case* (1) to recognise the existence of the debenture stock. The effect of the judgment of Bowen, L J., in that case was, that, if a company could not do a particular act, they could not be estopped from denying that they had done it. A statutory corporation is a legal entity with strictly defined powers, and they cannot contract beyond those powers or be held liable in damages for so contracting. And, if they cannot contract, they cannot bind themselves by a representation that they have contracted. The defendant company could not put Lupton in the position of a shareholder, and they cannot be bound by a representation that they have done so. This reasoning does not apply to an individual, because his power of contracting is not strictly limited in the same way as the power of a company.

[LORD ESHER, M.R. Would it apply to a mercantile firm, the members of which were by their articles of partnership prevented from contracting in a particular way?]

In such a case there would be no legal incapacity to contract with a third party; the partners would only be bound not to do so by an agreement inter se. The company had no power to make Lupton a shareholder, or to contract that he should become a shareholder; how can they be liable in damages for denying that which they cannot affirm?

But if a company can be estopped at all by such a representation, they can only be estopped by an instrument under seal. It has never yet been held that a company is estopped by the mere statement of a clerk, even if he was acting in the performance of a statutory duty. In all the cases in which it has been held that a company were bound by estoppel, there has been a document, such as a certificate of shares, under the seal of the company, and issued by them in the performance of a statutory duty. This was so in *In re Bahia and San Francisco Ry. Co.* (2); in *Hart* v. *Frontino, &c. Co.* (3); and in *In re British Farmer's Pure Linseed Cake Co.* (4) The dicta of James, L.J., in the

(1) 18 Q B D 714
(2) Law Rep. 3 Q. B 584.
(3) Law Rep 5 Ex 111
(4) 7 Ch. D 533.

latter case, which are relied on, were unnecessary to the decision, and are not supported by authority. It is the statutory duty of a company to issue a certificate to the holder of shares; there is no such duty to give a "certification," and it is not for the benefit of the company. A company can only declare who is a member by means of a certificate in accordance with the provisions of the Companies Acts and their own articles of association.

A decision in favour of the plaintiffs would extend the doctrine of estoppel further than it has ever yet been carried, and they have a remedy against their vendor Lupton. They can compel him to fulfil his contract to deliver shares to them, or pay damages. It was not a contract to deliver these particular shares.

As to Lord Tenterden's Act, s. 6 applies to an action founded upon such a representation. This was a representation concerning the "ability" of Lupton to transfer the shares, and it was made "to the intent or purpose" that Lupton might "obtain money" from the plaintiffs.

Again, all that the "certification" imports is, that a share certificate has been lodged. Assuming that the defendants are estopped by the certification from denying that a certificate of the shares was lodged, that does not import that they guarantee the title of the transferor, or are estopped from denying that he had a good title to transfer the shares. The damage to the plaintiffs does not arise from the fact that no certificate for the shares was lodged, but from the fact that the transfer to the transferor was invalid, and he had no title to the shares. Powter, having already transferred the shares, had no title to transfer them to Lupton, who, consequently, could not transfer them to the plaintiff Cuthbert. What representation was there by the defendants to estop them from alleging that this was so? No estoppel can be alleged which would establish the plaintiffs' title against the company.

*Henn Collins, Q.C.*, in reply.

*Cur. adv. vult.*

July 29. LINDLEY, L.J., delivered the following judgment, with which Lord Esher, M.R., and Bowen, L.J., concurred. This is

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an action brought by the purchasers of shares in the defendant company against the company for the value of 195 shares which the plaintiffs have bought, and the value of which the plaintiffs say they have lost by reason of the wrongful acts of the company. The 195 shares are divisible into two parcels, viz, 135 shares bought from a person named Lupton, on the faith of what is called a "certification," and 60 shares bought from a person named Angel. As regards these 60 shares, it appeared, however, when the facts were investigated, that the company never had refused to recognise the plaintiffs' title to them, and that the company had done nothing wrong. There is no necessity for alluding further to them. The facts as to the 135 shares are as follows: One Powter was the registered owner of 1000 shares in the defendant company, and he had the usual certificate under the seal of the company certifying him to be so. He sold and transferred the whole of these shares to Maitland and Balfour, and his certificate was lodged with the company to enable them to complete their title. After this, Powter purported to sell and transfer 135 of these same shares to Lupton; and Lupton in his turn transferred them to the plaintiff Cuthbert, to whom he had agreed to sell 135 shares in the company. Both transfers were "certificated," as it is called, by the secretary of the company, or by some one acting for him. The plaintiff Bishop was Cuthbert's principal in this transaction, and, on the faith of the certification on the transfer from Lupton to Cuthbert, Bishop paid Lupton the price of the shares; and, as the shares really belong to Maitland and Balfour, and not to the plaintiffs Cuthbert and Bishop, the company refuse to recognise their title. The plaintiffs contend that the company is estopped by the "certification" from denying Lupton's title, and is bound therefore either to accept Cuthbert as the present owner of the 135 shares or to pay the value of them to Bishop. This contention renders it necessary to ascertain the precise meaning and legal effect of a "certification," a term better known to business men than to lawyers. The certification is in these terms: "Certificate lodged." Then follows the name of the company and the signature of its secretary, or of the person signing for him. The certification is on the margin of Lupton's transfer to Cuthbert,

and the transfer identifies by their numbers the 135 shares transferred to him. The practice of giving "certifications" has arisen from the difficulty felt by members of the Stock Exchange in settling their accounts as buyers and sellers of shares where the seller's certificate of title does not accompany his transfer. If the seller's certificate includes more shares than he sells, he does not deliver it to the buyer with the transfer, but the seller produces his certificate and the transfer to an officer of the company, and he "certificates" the transfer; and buyers and their brokers act on the faith of this "certification" just as they would if the certificate produced to the company had been produced to and lodged with themselves. No fee is paid for a "certification." In every case the "certification" must be read in connection with the transfer on which it is put. The object of the "certification" is to enable the transferor to satisfy his transferee that he, the transferor, can make a good title to the shares mentioned in the transfer. This he can only do if he is himself the registered owner of the shares mentioned in the transfer, or if he has a transfer from the registered owner to himself, or to some one through whom he claims by a transfer or series of transfers. The "certification," therefore, to be of any use at all, must amount to a representation that the transferor has produced to the person certifying such documents as on the face of them shew a primâ facie title in the transferor to transfer the shares mentioned in the transfer; or, in other words, that the transferor has produced to the person certifying either what purports to be a certificate of the title of the transferor to the shares mentioned in the transfer or the equivalent of such a document, in other words, what purports to be a certificate of the title of some one else to those shares, and one or more documents purporting to transfer those shares from such person to the transferor. The evidence in this case shews that the certification does mean this. But the certification means no more, nor can it reasonably be supposed to mean more. The certification is made by the secretary or some other officer, who has no time to do more than look at the documents produced to him. If, in business language, they are "in order," i.e., if they are right on the face of them, he certifies; if they are not, he refuses to certify. But he has no

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means of ascertaining and no time to inquire whether the documents produced to him are genuine or not, nor whether the various transfers are valid or invalid in point of law. He acts on what he sees, and there is no pretence for saying that he does more or is understood by business men to do more. He does not warrant the title of the transferor, nor the validity in point of law of the various documents which together establish his title. That this is the true view of the effect of a certification will be apparent, if it is remembered that certifications are sometimes made by an official of the Stock Exchange, and not by any officer of the company the shares in which are the subject of transfer.

Having ascertained the true effect and meaning of a "certification," it is necessary to consider how far the defendant company is affected by the certification given by its secretary or clerk in the present case. It was said to be no part of the business of the company to give "certifications," and that the company was in no way bound or affected by the certification given. This, however, is, in my opinion, a complete mistake. It is part of the business of the company to give certificates of title to shares in it, and to register transfers of such shares and to place the names of the transferees on its own books. It is, moreover, to the interest of every company to do what it can to assist its shareholders to deal with their shares in the way in which shares in other companies are ordinarily dealt with, and, if the officers of a company conform to the ordinary practice in such a matter as I am considering, it is absurd to say that they are acting beyond any power the company can confer on them, and that the company is not bound by what they do. In my opinion, it is proved that to give "certifications" is incidental to the transaction in the ordinary business way of part of the legitimate business of all companies having capitals divided into shares which are transferable by deed or other instrument; and the certification in this case, having been given by the proper officer of the company in the ordinary way of business, is binding on the company, and the company is estopped from denying the truth of the facts certified either expressly or by necessary implication. What these facts are has been already stated in general terms. The facts necessarily

implied in this case are that Lupton produced a certificate purporting to shew that he or some registered owner, through whom he claimed by transfers also produced, was entitled to transfer to Cuthbert the shares mentioned in the transfer. In truth, however, Lupton produced no such certificate. He had none of his own, and he did not produce Powter's, through whom he claimed. This had been lodged long before by Maitland and Balfour. The plaintiff, however, was induced by the certification to part with his money, and he has lost it, and, if an action would lie for a careless misrepresentation, I should be of opinion that the plaintiff could recover the money thus lost from the defendants. But no action lies for such a misrepresentation. This was finally decided in *Peek* v *Derry* (1), which it is not for me to criticise.

It is, however, contended that the doctrine of estoppel can be made available to assist the plaintiff in this case. But the doctrine of estoppel cannot put the company in a worse position than if a certificate of Lupton's transferor, Powter, had been produced. If it had, still the transfer from Powter to Lupton would have been invalid, and Lupton, without any default on the part of the company, would not have been able to transfer the shares to Cuthbert. The fact, then, which the company is estopped from denying would not, if true, have entitled the plaintiff to the 135 shares. The loss of the shares as distinguished from the loss of the money paid for them is attributable, not to any misrepresentation by the company, but to something quite different —viz., the invalidity of the transfer from Powter to Lupton. If, indeed, the certification amounted to a warranty of Lupton's right to transfer, or if it were equivalent to a certificate by the company that Lupton was the registered owner of the shares which he purported to transfer to Cuthbert, the case would be very different and would be indistinguishable from *In re Bahia and San Francisco Ry. Co.* (2) But a "certification" and a certificate are totally different things. The lodging of one or more documents may be certified, and yet the documents lodged may be invalid owing to circumstances not apparent on the face of them; and in this case the defect in Lupton's title was caused by the invalidity of one of the documents produced, and not by the

(1) 14 App. Cas. 337. (2) Law Rep 3 Q B. 584.

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non-production of the certificate which the company erroneously certified to be lodged. The real truth is that the plaintiffs lost their money by reason of a misrepresentation for which no action lies; and they lost the shares transferred to them by Lupton because he had no title to them, and the company is not estopped from denying this. Under these circumstances, I am of opinion that the plaintiffs' remedy is not against the company, but against Lupton, who could not deliver the shares for which he was paid by the plaintiffs. In the result, therefore, I agree with Williams, J., that this action is not maintainable. I am not, however, able to concur in the whole of his reasoning. He has not, I think, attached sufficient importance to the fact that the transfer from Powter to Lupton was invalid; nor to the fact that the certification did not represent this transfer to be valid. Moreover, I think the learned judge was mistaken in considering this case governed by the observations of Bowen and Fry, L.JJ., in the *Charnwood Forest Railway Company's Case.* (1) There is nothing ultrà vires in this case as there was in that. Neither can I agree with him that Lord Tenterden's Act applies to this case. A statement that a document is lodged is not, I think, within that Act. The case relied on by Williams, J., was decided on a demurrer to a declaration which set out statements of a very different nature. For the reasons I have given, the defendants are, in my opinion, entitled to judgment, and the appeal ought to be dismissed with costs.

*Appeal dismissed.*

Solicitors for plaintiffs: *Woodcock, Ryland, & Parker, for Rowley & Chatwin.*

Solicitors for defendants: *Stretton, Hilliard, Dale, & Newman.*

(1) 18 Q. B. D. 714.

E. L.

## THE QUEEN *v.* THE VESTRY OF ST. MARY, ISLINGTON.

1890
*July* 10.

*Ecclesiastical Law—Churchwarden—Maintenance of Disused Churchyard or Burial-Ground—Repayment of Costs and Expenses—Certificate of Churchwarden—Burials Act,* 1855 (18 & 19 *Vict. c.* 128), *s.* 18.

By s. 18 of the Burials Act, 1855, the duty of maintaining disused churchyards and burial-grounds, and repairing the walls and fences thereof, is cast upon the churchwardens or burial board, as the case may be; and it is further provided that "the costs and expenses shall be repaid by the overseers upon the certificate of the burial board or churchwardens out of the poor rate."

A vestry passed a resolution to the effect that certain disused churchyards and burial-grounds in the parish should be maintained and the walls repaired by the churchwardens, the expenses of the maintenance and repair incurred by them to be paid to them by the vestry. Subsequently the vestry sanctioned extensive alterations to the walls of a burial-ground, and the senior churchwarden, acting upon such sanction, obtained tenders for the work and entered into contracts, by which he rendered himself liable for the costs of the alterations. Before the contracts were actually signed or any money paid under them by the churchwarden, he sent to the vestry a letter or precept requiring the payment of a sum of money within the amount for which he had made himself liable under the contracts:—

*Held*, that the vestry were bound to pay to the churchwarden the amount of expenses for which he, acting under their authority, had rendered himself liable, although not actually paid by him:

*Held*, further, that a letter or precept written by the churchwarden, and stating the sum required, was a sufficient certificate within the meaning of the section.

ORDER NISI for a mandamus to the defendants to shew cause why they should not pay to the prosecutor, the senior churchwarden of the parish of St. Mary, Islington, a sum of 500*l.* for certain expenses incurred by the churchwardens, and for which he had issued his precept to the defendants, and make a rate, if necessary, for such payment.

By 18 & 19 Vict. c. 128 (the Burials Act, 1855), s. 18, it is enacted that "in every case in which any Order in Council has been, or shall hereafter be, issued for the discontinuance of burials in any churchyard or burial-ground, the burial board or churchwardens, as the case may be, shall maintain such churchyard or burial-ground of any parish in decent order, and also do the necessary repair of the walls and other fences thereof; and the costs and expenses shall be repaid by the overseers, upon the

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certificate of the burial board or churchwardens, as the case may be, out of the rate made for the relief of the poor of the parish or place in which such churchyard or burial-ground is situate, unless there shall be some other fund legally chargeable with such costs and expenses."

Certain churchyards in the parish of St. Mary, Islington, including a burial-ground attached to the chapel of ease, had been closed for burials under an Order in Council, and the burial-ground was laid out as a recreation ground. On October 30, 1874, the vestry passed two resolutions relating to the disused churchyards and burial-ground—(1) that the churchwardens should "maintain the closed churchyards of the parish in decent order, and do the necessary repairs to the walls and fences, and that the expenses incurred by them be paid by the vestry through the accounts committee on their requisition, and charged to the poor rate"; and (2) "as to the recreation ground at the chapel of ease, that the amount necessary to meet the expenses of keeping the same up be paid by the accounts committee periodically to the senior churchwarden on his requisition or receipt." The boundary walls of the recreation ground at the chapel of ease having fallen into disrepair, it was, in January, 1890, resolved by the vestry, upon the report of a special committee, "that the senior churchwarden be asked to invite tenders for taking down the wall at present surrounding the ground, erecting new iron railings in lieu thereof, and carrying out such other works in connection therewith as may be necessary." The expense of these works was estimated by the committee at 580*l.* Acting upon this authority, Mr. Elliott, the senior churchwarden, obtained tenders, and in March, 1890, entered into contracts for the completion of the work at about the estimated cost, and in due course paid divers sums falling under the contracts. On February 1, 1890, before the making of any contract, and before the payment by the churchwarden of any money in respect of the work, the churchwarden, in accordance with the usual custom in the parish, sent to the vestry a letter or precept, in which, on behalf of the churchwardens, he asked for payment of 500*l.*, pursuant to the several resolutions of the vestry, dated October 30, 1874. The vestry having declined to comply with the precept,

an order nisi for a mandamus was obtained on behalf of the churchwarden.

*Henn Collins, Q.C.*, and *J. V. Austin*, for the defendants, shewed cause. The only duty of the vestry under s. 18 of the Act is to "repay" the costs and expenses to the churchwardens; they cannot pay to the churchwardens moneys which they have not in fact expended. Here the precept of the churchwarden was sent in to the vestry before any money had been paid by him at all, and before even he had incurred any liability by entering into a contract for the work. Even if the vestry could pay the churchwarden before he had himself paid any money under the contract, they could only do so under his "certificate," and the letter of the churchwarden was not a certificate within the meaning of the section; any payment made upon such a precept might have been surcharged by the auditor to the individual members of the vestry. The mere fact that there has been an inveterate custom in the past to pay upon such precepts is not sufficient to entitle the prosecutor to a mandamus, the granting of which must depend solely upon the strict legal rights of the parties.

*Sir R. E. Webster, A.G.* (*McCall*, with him), in support of the rule. The requirements of s. 18 have been complied with by the prosecutor. It is not necessary that the churchwarden's certificate should be in any particular form, and this letter or precept was a certificate for the purposes of the section; having regard to what both parties knew, it sufficiently indicated what the money was wanted for; it was, moreover, precisely similar to previous precepts of the prosecutor, which had been obeyed without question by the vestry. The use of the word "repay" in the section does not prevent the vestry from paying the churchwarden before he has actually spent the money; it would be absurd to suppose that the legislature intended that he should be 500*l.* out of pocket before receiving a penny from the vestry, and it is sufficient if he certifies to the vestry for a sum for expenses which have to be met by him.

POLLOCK, B. In this case we are asked to make absolute an order nisi for a mandamus to the vestry of St. Mary, Islington,

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Pollock, B

directing them to pay to the prosecutor, the senior churchwarden, a sum of 500*l.*, being the amount of his precept made on February 1, 1890. There is no doubt that the churchwarden became liable to pay the money in question in consequence of certain arrangements made at a previous date by the vestry; and the facts of the case which have necessitated the application to this court are such as to make me careful to ascertain exactly the legal position of the parties, and to give a strict legal interpretation to the statute. If there are two constructions open to us, one of which would lead to a deadlock while the other would afford a reasonable solution of any difficulties, then the business-like view must be adopted.

The previous conduct of the vestry certainly makes a very strong case upon the facts in favour of the churchwarden's contention. It was resolved by the vestry early in the year 1890 that a certain scheme should be adopted for dealing with this burial-ground, and instead of rebuilding the old walls at a cost of about 250*l.*, it was decided to surround it with iron railings at more than double that expense. Acting on that resolution, the churchwarden, as in duty bound, advertised for tenders for the work, and, having received the tenders, entered into a contract on March 12, by which he became personally liable for a considerable sum, exceeding 500*l.* On February 1, before the contract was entered into, the prosecutor, in accordance with a practice which had obtained for some years in the parish, sent to the vestry a letter, which he calls a precept, and in which on behalf of the churchwardens he requested payment to him of a sum of 500*l.* pursuant to certain resolutions made by the vestry in the year 1874; those were the resolutions by which the vestry practically undertook through the churchwardens the repair of the churchyard and burial-ground, and they form the foundation of the prosecutor's letter.

Now, I am inclined to agree with the Attorney-General that, in construing the word "certificate" we ought to take it in a reasonable sense, giving consideration to the facts which had already happened and which were known to both parties. The effect of s. 18 of the Burials Act, 1855, is to cast upon the churchwardens the duty of maintaining a disused churchyard in

decent order, and of doing the necessary repairs to the walls and fences, and it provides that the costs and expenses are upon the certificate of the churchwardens to be repaid by the overseers. That brings us to the first objection raised by the vestry, which is founded on the word "repay"; it is contended that a churchwarden cannot under that section be entitled to be repaid money, unless he has already paid it himself in the first instance. There is no doubt much to be said in favour of that contention; but when we remember the nature of the subject-matter in respect of which this legislation was passed, there is no difficulty in placing a reasonable construction on the word "repay," so as to make it include cases in which the churchwarden, acting under the authority of the vestry, has become liable for the payment of these costs and expenses; and this seems to me the reasonable construction which we ought to place on the language of the section.

The further difficulty is raised by the vestry, that even if that is the proper interpretation of the word "repay," the repayment is only to be upon the "certificate" of the churchwarden, and that there was no certificate, or no sufficient certificate, in the present case. It is to be remarked that the section does not require any particular matter to be certified, or any vouchers to be produced; it uses the general expression, "upon the certificate of the churchwardens"; that is all; and that is the view upon which for many years this particular vestry has acted; they have authorized the churchwarden to incur a personal liability, and upon receiving a letter from him naming the sum required they have treated it as a certificate under the section, and have paid him the amount. It is true that this particular letter does not mention in terms the purpose for which the money was required, but it clearly implies that it was in respect of the iron railing round the churchyard. I think, therefore, after hearing the whole case and having now a full appreciation of its subject-matter, that the requirement of a certificate was amply satisfied by the letter sent to the vestry by the prosecutor. I forbear to say whether the vestry have done rightly in resisting this mandamus; it is sufficient to say that the statute has been satisfied, and that this mandamus must be made absolute.

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A. L. SMITH, J. I am of the same opinion. We are asked by the prosecutor, a churchwarden, to direct the vestry to pay to him a sum of 500*l*, and, if necessary, to make a rate for the purpose, the application being founded on 18 & 19 Vict. c. 128, s. 18. The facts are short The prosecutor is the senior churchwarden, and he only received a small sum of money (under 10*l*.), from the outgoing churchwarden. The duty was cast upon the churchwardens of maintaining the walls of a disused burial-ground, which was used as a recreation ground; and a question arose whether the walls should be reconstructed, or whether iron railings should be substituted for them By a resolution of the vestry, the latter course was adopted. The vestry sanctioned the work; and Mr. Elliott, the prosecutor, was clearly authorized by them to accept tenders for the work. On the faith of that authorization he entered into a contract for the work; and before the work was executed he sent this letter to the vestry, asking for 500*l*. on account—a sum which, it is manifest from the affidavits, was within the amount of the liabilities which he had lawfully incurred. We have the additional fact that two prior requests of a like nature had been made to the vestry a short time previously, both of which were honoured. This request was disputed; hence this application for a mandamus.

It is said on behalf of the vestry that, upon the true construction of s. 18, no mandamus ought to go, unless the churchwarden can prove that he has paid out of his own pocket the sums of which he seeks repayment from the vestry. If that is so, an enormous responsibility is cast upon a churchwarden. He must, out of his own pocket, pay all legal disbursements before he can himself apply to the parish for payment. I agree that inveterate custom cannot control an Act of Parliament; but if it is consistent with the language of the statute and with good sense, it may throw some light on its construction. The whole question really is, whether s. 18 means that the churchwarden is only to be paid the expenses by the overseers after they have been actually expended, or whether it applies also to money which has to be expended by the churchwarden; and in my judgment the former reading of the section leads us to an absurd conclusion,

the latter to a sensible one. I think, therefore, that this ground of opposition to the mandamus fails.

It is further said that there must be a "certificate" of the churchwardens before the overseers are justified in paying them. What sort of certificate is necessary? It must clearly be in writing. A precept or a request to pay satisfies the language of the section. It must be a certificate of expenses which have to be paid. In my opinion the document signed by the prosecutor satisfies that meaning of the word; and we also know that for some years similar documents were always honoured by the vestry, and that two such documents of the prosecutor's were met this very year. In my judgment the vestry then acted rightly, and they cannot now take the point that this document was not a certificate. There are no morals in the position taken by the vestry in this case, and in my opinion there is no law.

*Order absolute for a mandamus.*

Solicitors for defendants: *Lewis & Sons.*

Solicitors for prosecutor: *Samuel Price & Son.*

W. J. B.

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## IN RE DODDS. EX PARTE VAUGHAN'S EXECUTORS.

*April* 18, 21, 24.

*Bankruptcy—Proof—Contingent Liability—Creditor's Estimate—Trustees' Assent—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 37—*Sched. II. r.* 2—*Bankruptcy Rules,* 1886, *rr.* 219, 228.

There is nothing in the Bankruptcy Act, 1883, or in the rules made under the Act, to warrant the conclusion that any limit is imposed to the time within which the trustee may reject a proof or claim in respect of a contingent liability.

A debtor covenanted by deed to pay B. during her life an annuity of 1440*l.* per annum, and subsequently became bankrupt. B. carried in a proof against the estate of the bankrupt for a sum which was admittedly the actuarial value of her annuity at that time. The trustee admitted the proof for voting purposes, and did nothing further. Some months afterwards B. died before any dividend had been declared:—

*Held*, that the trustee had not assented to the valuation which B. had placed on her annuity, and that he was entitled to reduce the proof to the actual amount of the instalments of the annuity due to her at the date of her death.

APPLICATION for an order directing the trustees in bankruptcy to admit a proof for the full amount claimed by the creditor.

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By deed dated January 2, 1885, J. Dodds and M. B. Dodds jointly and severally covenanted with Ann Vaughan to pay her an annuity of 1440*l.* by monthly instalments of 120*l.*, the first instalment to be paid on February 1, 1885.

On March 7, 1889, a receiving order was made against M. B. Dodds, and on March 11 one F. Brown, an accountant, was appointed by the Court to prepare the debtor's statement of affairs. Some correspondence then took place between F. Brown and the solicitors of Ann Vaughan, who claimed to be a creditor on the estate in respect of her annuity; and in a letter dated March 21, 1889, F. Brown stated that the value of the annuity, calculated according to the Carlisle table of mortality, was 7000*l.*, Mrs. Vaughan being in her seventy-fifth year. On May 22, 1889, Ann Vaughan filed a proof against the estate for 7240*l.*; of which 240*l.* represented two monthly instalments of the annuity which were in arrear at the date of the receiving order, and 7000*l.* represented the value of her annuity, on the basis of Mr. Brown's valuation.

On May 24, 1889, the first meeting of creditors was held, when a scheme of arrangement was adopted, which was duly confirmed by the Court on July 11, 1889, and Mr. W. B. Peat and F. Brown were appointed trustees to carry out the scheme, and their appointment was duly confirmed on July 17, 1889.

On March 22, 1889, a receiving order was made against J. Dodds; and on April 9 Ann Vaughan filed a similar proof against his estate for 7240*l.* in respect of her annuity.

On September 22, 1889, Mrs. Vaughan died, having by her will appointed H. D. Pritchard and E. J. Elvins her executors, who duly proved the same.

On December 12, 1889, the trustees wrote to Messrs. Pritchard, Englefield & Co., the solicitors of Ann Vaughan's executors, the following letter:—

"*Re* M. B. Dodds.

"Referring to the proof of debt for 7240*l.* against the above estate lodged by the late Mrs. Ann Vaughan, as the basis upon which the proof was made has been altered by the fact of her recent death, it will be necessary that an amended proof should

be made in the circumstances, which should be limited to the amount of the annuity due and unpaid to the date of her death, and the original proof withdrawn."

The executors refused to withdraw the proof, on the ground that it had been admitted and acted on, and on January 7, 1890, the trustees served them with a written notice rejecting the proof to the extent of 5920*l.*, on the ground that the annuity had been determined by the death of Mrs. Vaughan. Thereupon the executors applied to the Court that the trustees might be directed to admit the proof to the full amount, viz., 7240*l.* No dividend had been declared.

*E. C Willis, Q.C.*, and *Rubie*, for the applicants. Under rule 228 of the Bankruptcy Rules, 1886, the trustees ought to have admitted or rejected our proof within twenty-eight days after it was filed. They have no right, months afterwards, to reject the claim. This application ought really to be treated as a motion by the trustee to expunge the proof: *Re Voght.* (1)

*Winslow, Q.C.*, and *Yate Lee*, for the trustees. Nothing that Brown did, before his appointment as trustee, can bind him or his co-trustee, as trustees, or affect the rights of the creditors. By the 37th section of the Act the trustee is directed to value a contingent liability, and there can be no proof until he has made his valuation. This is a claim in respect of a contingent liability, and no valuation has been made by the trustees. If necessary, the Court will be requested to extend the time to enable the trustees to estimate the claim correctly. The principles which guide the Court in extending time are laid down in *Banner* v. *Johnston* (2); *In re Manchester Economic Building Society.* (3) As to the method of valuation, the only proof admissible is the amount due to the annuitant at the time of her death: *In re Bridges* (4); *Macfarlane's Claim.* (5)

*E. C. Willis, Q.C.*, in reply. Mrs. Vaughan acted on the letter of March 21, and the proof was admitted by the official receiver, and was used in support of the scheme of arrangement,

(1) 3 Mor. Bkcy. Cas. 164.
(2) Law Rep. 5 H. L. 157, at p. 170.
(3) 24 Ch. D. 488.
(4) 17 Ch. D. 342.
(5) 17 Ch. D. 337.

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which was confirmed by means of it. If a trustee accepts the valuation made by a creditor, that is in fact an assent by the trustee to the amount of the valuation, and he is bound by it. Here the trustees adopted the valuation by their acts, and must take it for better or for worse, and it is too late now for them to reject it. The principle of *Ex parte Bates* (1) applies.

[CAVE, J. If I come to the conclusion that the matter is still open, is the valuation by the trustees correct?]

*E. C. Willis*: Yes.

*Cur. adv. vult.*

April 24. The following judgment was delivered by

CAVE, J. As this case involved a question of some little importance, I took time to consider my decision. The facts are these. [The learned judge stated the facts, and continued:—]

The appellants contend that the trustees ought to have moved to expunge Mrs. Vaughan's proof, and that they cannot now reject it. I do not think that the course which has been pursued by the parties is strictly in accordance with the letter of the law; but that is not important, because I propose to decide the case upon its merits without having regard to what has taken place. The 37th section of the Act contains a description of debts and liabilities provable in bankruptcy, and the 4th sub-section provides that the trustee shall make an estimate of the value of any provable debt or liability, which, by reason of its being subject to any contingency, or for any other reason, does not bear a certain value; and then Sched. II., r. 2, prescribes the mode of proof. These are the provisions in the Act of Parliament itself, which are to be further carried out by rules, and in accordance therewith rules have been made, which were introduced in 1886. One of such rules is the 219th, which provides that a creditor's proof shall be in the form No. 72 in the Appendix, with such variations as circumstances may require. Form No. 72 is a form which is adapted to goods sold or to money lent, and apparently is intended for debts which are certain, and which may be payable at the time of the bank-

(1) 11 Ch. D. 914.

ruptcy, or will become payable at a certain fixed date after the bankruptcy. I do not find any form, nor do the rules appear to be directed to a case, of debts or liabilities of a different character. Then rule 228, which was also referred to in the course of the arguments, provides that, subject to the power of the Court to extend the time, the trustee shall, within twenty-eight days after receiving a proof which has not been previously dealt with by the official receiver, in writing, either admit or reject it wholly or in part, or require further evidence in support thereof. Now it is said that where, as in this case, a creditor sends in a proof in respect of a liability which is contingent, and also makes an estimate of the sum at which the contingent liability ought to be valued for the purpose of proof, the trustee who receives that claim is bound, if he does not agree with the valuation, to reject the proof within twenty-eight days under rule 228. Now, I cannot find that that is at all within the provisions of the Act and rules. As I have said, the Act contemplates that the value of a contingent liability shall be placed upon it by the trustee and not by the creditor, who is obviously in a vast majority of cases perfectly unable to place any value at all upon a contingent liability; and, although in this case Mrs. Vaughan sent in her proof, in which she valued her claim against the estate at so much money, it is probable that she knew nothing at all of the principle on which her claim was based. Looking at the Act and the rules, it appears that neither Act nor rules require that a trustee shall reject or admit a proof or require further evidence of a claim of this kind which professes to estimate the value of a contingent liability. The reason of rule 228 is obvious. When a man sends in his claim it would be extremely unfair for the trustee to maintain silence for a time and then to demand from him particulars of his claim. Take the ordinary case of goods sold and delivered: upon a proof being made, it would be unfair for the trustee to postpone indefinitely the allowance of the proof. I think it is with regard to considerations of that kind that rule 228 applies. No doubt it might very well be contended that much of Mrs. Vaughan's claim or proof, or whatever you like to call it, consists of allegations of matters of fact, which the trustee was bound to reject or admit within one month, and that

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Cave, J.

he was not at liberty to hold over the question indefinitely, or call upon Mrs. Vaughan to give further proof after that time. But that does not apply to her valuation of a contingent liability. Once admit the validity of the deed by which this annuity is to be paid, and the age of the lady, and you have nearly the whole of the materials upon which the calculation of her claim can be made; and it is obvious that the longer the actual calculation is put off the more likely it is to be correct. Where, as in this case, the claimant dies, you are not driven to a valuation, but are able to ascertain the actual value at the time of the bankruptcy. Where the claimant does not die in the interval, still, the longer the calculation is put off, the more likely it is that a correct valuation will be arrived at. Supposing it were deferred for ten years, it is obvious that at the expiration of ten years the trustee would have a better chance of valuing the life than at the commencement of the period. It is not likely that such a case would arise in practice; but it shews that there would be no injury in putting off the valuation. It is said, however, that, whatever may be the general rule, the trustees have in this particular case assented to the valuation placed upon the contingent liability by Mrs. Vaughan. No doubt there may be an assent by a trustee to the valuation made by a creditor. He may adopt the valuation of the creditor as fair and reasonable, and, undoubtedly, if he does that, it is as good as if he had himself placed an estimate on the value of the contingent liability. Has that been done in this case? Now, there is no proof that the trustees actually adopted Mrs. Vaughan's valuation. No correspondence took place, and nothing apparently was done after the proof was sent in until after the letter of December 12, 1889, was written. It is said that I ought to infer from the silence of the trustees that they assented to the valuation put on the annuity. Now, if anything were done by the creditor in consequence of what the trustee did, that might be ground for assuming an assent by the trustee; but, when the legislature does not call upon him to make any estimate in any definite time, and no dividend has been declared, I do not see that I can take his silence as being an assent to the valuation. No doubt cases may occur where the trustee may be estopped

from denying that he has assented to the creditor's valuation. For instance, when he has led the creditor to do some act in the belief that he has given his assent. But nothing of the kind has taken place here. It seems to me that the matter was left at large. No estimate has been formed by the trustees or assent given by them to the estimate formed by the creditor. That the estimate made by a creditor is no part of his proof is clear, because the Act does not contemplate that it shall be done, and there is no objection in reality or substance to what the trustees have done. Is there any hardship in consequence of this decision on the executors? Not the least. They will receive exactly the same proportion as the other creditors—that is to say, a dividend upon all the instalments which would have become due if there had been no bankruptcy; but if I adopted the contention of the executors, they would receive more than the other creditors. No doubt, if a trustee makes an estimate, then that is something done by him, and the liability is fixed. But here nothing stands in the way of the trustees forming an estimate of the liability which the actual facts shew to be just and proper. I therefore adopt the contention of the trustees as to the amount for which the executors are entitled to prove, and dismiss the appeal.

Solicitors: *Pritchard, Englefield & Co.; Munns & Longden.*

H. L. F.

1890
July 11

[IN THE COURT OF APPEAL.]

IN RE SMITH. EX PARTE HEPBURN.

*Bankruptcy—Leasehold Interest of Bankrupt—Disclaimer by Trustee in Bankruptcy—Mortgage by Underlease—Assignment by Mortgagee to Trustee for Himself—Vesting Order—Bankruptcy Act,* 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6.

A bankrupt being lessee of premises, the trustee in the bankruptcy, with the leave of the Court, disclaimed the lease. The bankrupt had mortgaged the premises by way of underlease, and the day before the application for leave to disclaim was heard the mortgagees assigned the mortgage debt and the security to a nominee of their own (a person of small means), who was to hold the property for the residue unexpired of the term of the underlease, subject to the subsisting equity of redemption. The deed of assignment contained a declaration by the assignee that he would stand possessed of the debt and the security in trust for the assignors, and to be assigned and disposed of as they might direct. The assignment was made for the purpose of escaping liability under the lease:—

*Held*, that, notwithstanding this assignment, the assignors still remained "mortgagees by demise" of or "entitled to" the leasehold property within the meaning of sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, and that they must be excluded from all interest in, and security upon, the property, unless they were willing to accept a vesting order as provided by sub-s. 6.

APPEAL by Messrs. Hepburn, who were mortgagees by way of underlease from Arthur Smith, a bankrupt, against an order made by Cave, J., excluding them from all interest in, and security upon, the mortgaged property (the original lease of which had been disclaimed by the trustee in the bankruptcy), unless they should within two months elect to take, and apply to the Court for, an order vesting the property in them, subject to the same liabilities and obligations as the bankrupt was subject to in respect thereof under the original lease at the date of the filing of the bankruptcy petition.

The original lease was granted to the bankrupt on October 4, 1883, for a term of ninety-nine years from June 24, 1883, subject to the payment of a ground-rent and the performance and observance of certain covenants.

On February 21, 1884, the bankrupt mortgaged the property to the appellants by an underlease for all the residue then to come of the term of ninety-nine years (except the last day

thereof), the mortgage being made to secure the repayment, with interest, of a sum of 2400*l.* advanced by the appellants to the bankrupt.

In 1885 Smith was adjudicated a bankrupt. In March, 1890, the trustee in the bankruptcy gave notice of an application to be made to the Court, on April 17, for leave to disclaim the original lease. The notice was served on the mortgagees. On April 16, 1890, the mortgagees executed a deed by which they assigned to H. M. Adcock absolutely the mortgage debt, and all interest due and to become due thereon, and the full benefit of all securities for the same. By the same deed the mortgagees assigned to Adcock the property comprised in the indenture of mortgage, to hold the same for all the residue then unexpired of the term thereby granted, subject to such right or equity of redemption as was then subsisting therein by virtue of the same indenture. The deed of assignment contained a declaration by Adcock that he would stand possessed of the mortgage debt and interest, and the security for the same, in trust for the assignors, and to be assigned and disposed of as they might direct. On April 17, 1890, the application for leave to disclaim was heard by the registrar, and an order was made giving the trustee leave to disclaim. In pursuance of this order the trustee, on April 24, executed a disclaimer. On May 2 the original lessor gave a notice of motion (which was served on the mortgagees and on Adcock), asking that, unless the mortgagees should, on or before the hearing of the application, elect to take and apply for an order vesting in them the mortgaged property, subject to the same liabilities and obligations as the bankrupt was subject to in respect thereof under the original lease at the date when the bankruptcy petition was filed, the mortgagees might be excluded from all interest in, and security upon, the mortgaged property.

Upon the hearing of this motion, Adcock offered to take an order vesting the property in him on the above terms. It was admitted that he was a clerk in the office of one of the mortgagees, who was a solicitor, and that he was a man of small means.

The learned judge made an order in the terms of the application

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by the lessor. The order as drawn up contained a clause absolutely excluding Adcock from all interest in, and security upon, the mortgaged property, without giving him the option of taking a vesting order.

The mortgagees appealed, and Adcock joined in the appeal.

*Cozens-Hardy, Q.C.*, and *Yate Lee*, for the appellants. The offer of Adcock, the legal assignee of the underlease, to take a vesting order, ought to have been accepted by the judge. He had no jurisdiction under s. 55 (1) of the Bankruptcy Act, 1883,

(1) Sect. 55, sub-s. 1, provides that, Where any part of the property of the bankrupt consists (inter alia) of land of any tenure burdened with onerous covenants, the trustee may, as therein mentioned, disclaim the property.

By sub-s. 3: "A trustee shall not be entitled to disclaim a lease without the leave of the Court, except in any case which may be prescribed by general rules, and the Court may, before or on granting such leave, require such notices to be given to persons interested, and impose such terms as a condition of granting leave, and make such orders with respect to fixtures, tenants' improvements, and other matters arising out of the tenancy as the Court thinks just."

By sub-s. 6: "The Court may, on application by any person either claiming any interest in any disclaimed property, or under any liability not discharged by this Act in respect of any disclaimed property, and on hearing such persons as it thinks fit, make an order for the vesting of the property in or delivery thereof to any person entitled thereto, or to whom it may seem just that the same should be delivered by way of compensation for such liability as aforesaid, or a trustee for him, and on such terms as the Court thinks just; and on any such vesting order being made, the property comprised therein shall vest accordingly in the person therein named in that behalf without any conveyance or assignment for the purpose. Provided always, that, where the property disclaimed is of a leasehold nature, the Court shall not make a vesting order in favour of any person claiming under the bankrupt, whether as underlessee or as mortgagee by demise, except upon the terms of making such person subject to the same liabilities and obligations as the bankrupt was subject to under the lease in respect of the property at the date when the bankruptcy petition was filed, and any mortgagee or underlessee declining to accept a vesting order upon such terms shall be excluded from all interest in and security upon the property, and if there shall be no person claiming under the bankrupt who is willing to accept an order upon such terms, the Court shall have power to vest the bankrupt's estate and interest in the property in any person liable either personally or in a representative character, and either alone or jointly with the bankrupt, to perform the lessee's covenants in such lease, freed and discharged from all estates, incumbrances, and interests created therein by the bankrupt."

to make an order vesting the lease in Messrs. Hepburn; he could only make an order vesting it in Adcock, who has the legal estate in the underlease. No doubt the assignment was made to him for the purpose of protecting the mortgagees from the liability on the lessee's covenants in the original lease which, as appears by the judgment of this Court in *In re Finley* (1) (though the point was not there decided), they might possibly incur, if they accepted a vesting order under s. 55, as if they had been original lessees. But the Court cannot properly take into account the motive with which the assignment was made. The words "underlessee or mortgagee by demise," in sub-s. 6 of s. 55, include the assignee of a mortgage by underlease. Messrs. Hepburn, who have now only an equitable interest in the underlease, are not persons "entitled thereto" within the meaning of s. 55, and they do not come within the words of the proviso. But for the proviso the Court would not have power to make such an order at all. The object of s. 55 was to enable the Court to put the underlessee or his assignee in direct relation with the original lessor upon the same terms as the original lessee. But the person to enter into that relation is the legal owner of the underlease. It could not have been intended that the transferee of a mortgage by underlease made by a bankrupt should lose all his interest in the property, unless the original mortgagee, who had parted with all his interest, should be willing to assume the liability of the bankrupt under the original lease. The fact that the transfer of the underlease was made in order to escape liability does not make the deed bad either at law or in equity: *Taylor* v. *Shum* (2); *Fagg* v. *Dobie*. (3) But for the statute, a lessee could never escape from his liability to his lessor, and a mortgagee by underlease would not be under any liability to the original lessor. If no order is made by the Court the mortgagee will not be liable under the covenants in the lease, though he can be ejected by the lessor if he does not perform those covenants. The lessor asks that a greater advantage may be given to him by means of a vesting order, and the only person who can be compelled to accept such an order is the legal owner of the underlease. Cave, J., had no power to exclude the mortgagees from all interest in the property,

(1) 21 Q. B. D. 475, 487. (2) 1 B. & P. 21. (3) 3 Y. & C. (Ex.) 96.

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when Adcock, the legal transferee of the lease, was willing to accept a vesting order. The effect of the order appealed from is, that the lessor will gain by the bankruptcy; he will get solvent tenants in place of the bankrupt. Such a result could hardly have been contemplated by the legislature. If the mortgage had originally been made to Adcock as a trustee for Messrs. Hepburn, they could not have been compelled to accept a vesting order. A mortgagee by assignment of the original lease will, if the order is right, be in a better position than a mortgagee by underlease, for he can always get rid of his future liability on the covenants in the lease by assigning it. Sub-s. 6 expressly authorizes the making of a vesting order in favour of a trustee for a person entitled thereto. The object of that provision must be the protection of the cestui que trust from liability, which can only be given by the trustee becoming liable under the covenants in the lease.

If Messrs. Hepburn are to be treated as still the mortgagees, it cannot be right to exclude Adcock from all interest in the property. It may be right to exclude either them or Adcock; it cannot be right to exclude both.

*Sidney Woolf, Q.C.*, and *A. T. Lawrence*, for the lessor. The evidence shews, and it is not really denied, that the assignment to Adcock was made for the express purpose of escaping liability on the covenants in the lease. The Court has a discretion as to making a vesting order, and it will not assist in the evasion of the Act. Cave, J., has exercised his discretion, and this Court will not readily interfere. He was right under the circumstances in excluding Adcock. It is not contended that in no case can sub-s. 6 apply to the assignee of an underlessee or of a mortgagee by demise. But an assignee like Adcock, who only came into existence after the disclaimer by the trustee, is not within sub-s. 6. In substance and in equity Messrs. Hepburn are still "mortgagees by demise," and it is right, therefore, that they should be excluded from all interest in the property, unless they will accept a vesting order. It does not necessarily follow that only one person can be entitled as underlessee or mortgagee by demise; there may well be two.

[They were stopped by the Court.]

LORD ESHER, M.R. In this case a landlord asked the Court of Bankruptcy to interfere in his favour by making against underlessees of his bankrupt lessee an order such as was made in *In re Finley* (1), an order which this Court then held to be a right order as against such an underlessee. The claim was made against Messrs. Hepburn, who are mortgagees by way of underlease from the bankrupt, and, unless the case is altered by the conveyancing device which has been adopted by them, the order which the lessor claimed, and which Cave, J., has made, is clearly right. The only question, therefore, is, whether this conveyancing device has altered the rights of the parties,—whether a lessor, upon whom valuable rights are conferred by s. 55, can be deprived of them by a mere piece of conveyancing, which, as between the parties to it, was not intended to have any effect at all, except for the purpose of defeating the provisions of the Act of Parliament and the rights conferred by it upon the lessor. It seems to me that in such a case the Court will treat the deed of assignment as a mere sham, and on that ground alone as absolutely void so far as it affects the rights of the lessor. To adopt the language of Alderson, B., in *Fagg* v. *Dobie* (2) (substituting the word "sham" for the word "fraudulent"), "There is no doubt that a fraudulent assignment is as no assignment at all. In that case, both at law and in equity, the act is altogether void." That, as it appears to me, lays down a good principle both at law and in equity, and it applies strictly to the present case. The assignment of the underlease to Adcock was, therefore, absolutely void as regards the rights given to the lessor by s. 55, and the case is brought within the decision of this Court in *In re Finley.* (1) Consequently, the order of Cave, J., was right, and the appeal must be dismissed.

LINDLEY, L.J. I think this ingenious attempt to evade the Act ought not be allowed to succeed. In a certain sense, no doubt, it was perfectly legitimate: the parties to the deed of assignment meant what they said. But we must look at the effect of the deed upon the rights of the original lessor. The object of the deed was not to affect the rights of the parties to it

(1) 21 Q. B. D. 475, 487. (2) 3 Y. & C. (Ex.) at p. 103.

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in the slightest degree; its object was merely to deprive the lessor of rights which, but for the deed, he would have had under s. 55. Can the Court give effect to the deed? As between the parties to it its effect is absolutely nil. But, as regards the lessor, what is the position of things? Messrs. Hepburn still remain mortgagees of the property. They are the only persons who have a beneficial interest in the underlease. Adcock is a bare trustee for them; he has no rights of his own. It really comes to this, is the Court bound to treat this deed as an assignment of the mortgage? The case is like that of a transfer of shares in a company to an impecunious person for the purpose of enabling the transferor to escape liability from calls; the Court does not allow such a device to succeed. It appears to me that, notwithstanding the assignment, the words of the first part of sub-s. 6 of s. 55 apply, "the Court may make an order for the vesting of the property in any person entitled thereto." The appellants are the persons "entitled to" the demised property in the present case. The subsequent proviso does not affect those words; it only deals with the terms and conditions upon which a vesting order is to be made. In my opinion, the decision of Cave, J., was quite right.

BOWEN, L.J. I am of the same opinion. We start with this, that the lessor of a bankrupt has, or is supposed to have under s. 55, certain rights against a mortgagee by demise from the bankrupt. In my opinion, those rights cannot possibly be defeated by an assignment of the mortgage to a bare trustee for the assignor, to be dealt with as he shall direct, with the sole intent of defeating the rights of the lessor. In my opinion, such a deed is a mere sham and of no legal effect, and is in that sense a fraudulent deed.

*Appeal dismissed.*

Solicitors: *Hepburn, Son, & Cutcliffe; Barlow & James.*

W. L. C.

## ALDEN v. BECKLEY & CO.

1890
Aug. 8.

*Practice—Action against a Firm—Service of Writ on Firm—Subsequent Service on Partner—Judgment by default signed against Firm within eight days of Service on Partner—Subsequent Appearance by Partner—Right of Partner to set aside Judgment against Firm—Order IX., r. 6; Order XII., r. 15; Order XLII., r. 10.*

The writ of summons in an action against a firm was duly served upon the firm, and five days afterwards was served upon an alleged partner. Judgment by default was signed against the firm; subsequently to the signing of the judgment, but within eight days from the service of the writ upon him, an appearance was entered by the partner:—

*Held*, that the partner was entitled to have the judgment against the firm set aside.

APPEAL from Day, J., at chambers, affirming a decision of the master, by which a judgment signed against the defendants in default of appearance was set aside.

The action was brought on certain bills of exchange against the defendants, a firm of H. Beckley & Co., and on May 29, 1890, service of the writ of summons was effected under Order IX., r. 6, upon the person having the control or management of the business; and on June 3 service was also effected on one H. J. Denison, who was alleged to be a partner in the firm of H. Beckley & Co. He was served as a partner, but denied the existence of any partnership. On June 6 judgment by default was signed against the firm, and execution was issued upon the judgment. On June 9 Denison appeared to the writ under Order XII., r. 15, his appearance being an unconditional one in the ordinary form, "Enter an appearance for H. J. Denison," and not stating whether he appeared as a partner. Denison then applied in chambers to have the judgment against the firm set aside, on the ground that it had been prematurely signed, as by Order XLII., r. 10 (1), its effect would be to allow of execution

(1) By Order XLII., r. 10: "Where a judgment or order is against a firm, execution may issue:—

"(b.) Against any person who has appeared in his own name under Order XII., r. 15, or who has admitted on the pleadings that he is, or who has been adjudged to be, a partner."

"(c.) Against any person who has been served as a partner with the writ of summons, and has failed to appear."

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being issued against his goods as a partner, although the judgment had been signed within eight days from the service of the writ upon him, within which time he might appear and defend. The master made the order, and the judge affirmed it; the plaintiff appealed.

*Arthur Powell*, for the plaintiff. The judgment was regular, and ought not to be set aside. It was a judgment against the firm, and was not signed until the expiration of the statutory period of eight days after the service upon the manager, which was a good service under Order IX., r. 6. The mere fact that the plaintiff subsequently served Denison, an alleged partner, with the writ, cannot have the effect of preventing him from signing judgment by default against the firm. The entry of appearance by Denison has the effect of preventing the plaintiff from issuing execution against his personal goods under Order XLII., r. 10.

*Gore*, for the defendant Denison. The order was right. If Denison had been served at the same time as the firm, and had appeared to the writ, no judgment against the firm could have been signed. He ought not to be liable to execution against his personal goods under a judgment against the firm simply because the plaintiffs delayed serving him, and practically prevented him from appearing before the judgment against the firm was signed. [He was stopped by the Court.]

POLLOCK, B. The difficulty has apparently arisen through the form in which the defendant has appeared, which was probably adopted in view of the opinion of the Court of Appeal in *Davies* v. *André*. (1) I am clearly of opinion that the view taken by Day, J., at chambers, was correct, and that this appeal must be dismissed.

GRANTHAM, J. I am of the same opinion.

*Appeal dismissed.*

Solicitor for the plaintiff: *Toomer.*

Solicitors for the defendant: *Snell, Son, & Greenip.*

W. J. B.

(1) 24 Q. B. D. 598.

[IN THE COURT OF APPEAL.]

1890
*July* 16.

IN RE AN INTENDED ARBITRATION BETWEEN SMITH & SERVICE AND NELSON & SONS.

*Arbitration—Submission to three Arbitrators—Refusal of Party to appoint an Arbitrator—Power of Court to compel Party to appoint Arbitrator*—9 & 10 *Wm.* 3, *c.* 15, *s.* 1—3 & 4 *Wm.* 4, *c.* 42, *s.* 39—52 & 53 *Vict.* *c.* 49, *ss.* 1, 27.

Where an agreement to refer disputes to arbitration provides for a reference to three arbitrators, one to be appointed by each of the parties, and the third by the two so appointed, and one of the parties refuses to appoint an arbitrator, the Court has no power, either under or apart from the Arbitration Act, 1889, to order him to do so.

APPEAL from an order of the Queen's Bench Division (Lord Coleridge, C.J., and Wills, J.), affirming an order in chambers that the appellants should within seven days appoint an arbitrator under an arbitration clause in a charterparty.

By a charterparty, dated November 28, 1889, Messrs. Nelson & Sons chartered a steamship belonging to Messrs. Smith & Service for a period of at least three months, for a voyage or voyages to America, it being stipulated that the ship should be at the disposal of the charterers for a voyage commencing on December 3. The ship did not arrive until December 6, and the charterers refused to take her; whereupon the shipowners claimed damages for a breach of the charterparty. The charterparty contained the following arbitration clause: "Should any dispute arise between the owners and charterers, the matters in dispute shall be referred to three persons, one to be appointed by each of the parties hereto, and the third by the two so chosen, whose decision, or that of any two of them, shall be final; and for the purpose of enforcing any award this agreement may be made a rule of Court." On December 7 the shipowners gave notice to the charterers that they had appointed an arbitrator, and called upon them to appoint one also; but the charterers took no notice, and appointed no arbitrator. On January 1, 1890, the Arbitration Act, 1889, came into operation, and on April 28, 1890, the shipowners served a fresh notice of appointment of an arbitrator upon the charterers, who still declined to

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appoint an arbitrator. The shipowners thereupon took out a summons at chambers, and obtained an order that the charterers should within seven days from the date of the order appoint an arbitrator in the terms of the submission to arbitration contained in the charterparty, which order was upheld by the Divisional Court as above mentioned.

The charterers appealed.

*French, Q.C.*, and *C. A. Russell*, for the appellants. The Court had no jurisdiction under the Arbitration Act, 1889, to make the order. Sect. 4 has no application to the present case, for no legal proceedings have been commenced, and ss. 5 and 6 are equally inapplicable, as they do not apply to references to three arbitrators, which the submission in the present case provides for. The Court proceeded under s. 1 (1), upon the ground that as the submission had been made a rule of Court they would do anything that was requisite to compel the carrying out of the arbitration. But this section has given no new remedy that did not exist before the Arbitration Act, 1889, came into operation, and prior to the Act there was no power to force a party to appoint an arbitrator, or to attach him for refusing to do so, the only remedy being by an action for breach of the agreement to appoint an arbitrator. The intention of the legislature in s. 1 was not to make a submission which had been made an order of Court enforceable as though it were a judgment, but to save the expense of making it an order of the Court by treating it as having been so made.

*Barnes, Q.C.*, and *Leck*, for the respondents. The meaning of making a submission a rule or order of Court is, that the Court has ordered that to be done which is necessary to the carrying out of the agreement to refer, and the present order only limits the time within which the necessary appointment of an arbitrator is to be made. The effect of the statute is to make the agreement the order of the Court, and the Court has

(1) By s. 1 of the Arbitration Act, 1889 (52 & 53 Vict. c. 49): "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court."

an inherent power to enforce what by statute is its own order. This power existed before the Arbitration Act, 1889; but at any rate s. 1 of that Act gives the power, even if it did not exist previously.

[LORD ESHER, M.R. A Court of Equity had no power to decree specific performance of an agreement to refer to arbitration; but you suggest that the Courts of Common Law had such a power.]

Yes; the rule of Court was in itself a decree of specific performance.

[BOWEN, L.J. The language of s. 1, "A submission shall be irrevocable," is ambiguous; it is applicable, not to the agreement to refer, but to the authority of the arbitrator; the latter is not enough for you, for the arbitrator has not been appointed.]

That difficulty is cured by s. 27 of the Arbitration Act, 1889, which shews clearly that the operation of s. 1 is not confined to agreements to refer to a named arbitrator, for it defines "submission" as "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

[The following authorities were cited in the course of the arguments: *Gumm* v. *Hallett* (1); *Thomson* v. *Anderson* (2); *Randell* v. *Thompson* (3); *In re Rouse and Meier* (4); *Fraser* v. *Ehrensperger* (5); *Davila* v. *Almanza.* (6)

LORD ESHER, M.R. In this case, in an ordinary mercantile agreement, that is to say, in a charterparty, there is a not unusual arbitration clause, providing that, in case of any dispute arising, that dispute shall be referred to three arbitrators, one to be appointed by each of the parties, and the third by the two arbitrators who have been so appointed; it is not a reference to two arbitrators and an umpire, but to three arbitrators. The submission was made a rule of Court when only one of the arbitrators had been nominated; he had been nominated by the respondents, but the appellants have refused to nominate an arbitrator. Thereupon the Court was asked to make an order

(1) Law Rep. 14 Eq. 555.
(2) Law Rep. 9 Eq. 523.
(3) 1 Q. B. D. 748.
(4) Law Rep. 6 C. P. 212.
(5) 12 Q. B. D. 310.
(6) 1 Salk. 72.

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upon the appellants, calling upon them to appoint an arbitrator, and to appoint him within seven days. The objection is taken that the Court had no jurisdiction to make an order of that nature at all. If the Court cannot make an order on one of the parties to appoint an arbitrator, it is impossible to say that it could make an order upon him to appoint one within seven days; for if it cannot do the less, it cannot do the greater. The question, therefore, is whether the Court has jurisdiction to make an order on the appellants to appoint an arbitrator, they having refused to do so.

The question is said to depend on the true construction of the Arbitration Act, 1889. As this was to be a reference to three arbitrators, it is obvious that the case does not come within sections 4, 5, or 6, and that point is given up. But it is said that it is within s. 1, and that that section gives the Court power to make the order. Now the case was argued for a long time thus: that the Court had the power before the Act, and that s. 1 therefore adopts the power which the Court had before; and if the Court had that power before, I certainly think that s. 1 adopts it; but if the Court had not the power before, then arises the question whether s. 1 has given it. It was said that the Court had this power ever since the passing of 9 & 10 Wm. 3, c. 15. It is admitted, however, that no Court of Law or Equity has ever exercised that power; but it suggested that the existence of that power had never been suspected until now. It is an extraordinary proposition, that out of all the countless persons who have been interested in arbitrations for nearly two hundred years not one of them ever thought until now that the Court had power to make this order; it is a proposition which I do not accept, and which seems to me, with great deference, to be absurd. Even supposing the language of the Act of Wm. 3 could be made to comprise such a power, I should decline to invent a new practice after such a state of things as that which has existed from the time of William III. to the present day.

In addition to this, we know that parties have gone to the Courts of Equity to try and obtain specific performance of this supposed obligation to appoint an arbitrator; and the Courts

of Equity, although they have had the statute of Wm. 3 before them, have declined to grant specific performance. Such an application must have been made on the ground that the Common Law Courts had no power to do it; for otherwise the Courts of Equity would simply have declined to interfere. It must have been present to their mind, therefore, that the Common Law Courts had not the power; and notwithstanding this, the Courts of Equity came to the conclusion that the Act of Wm. 3 did not give them power to grant specific performance, or, in other words, that there was no power in law or at equity by which the one party could be ordered to appoint an arbitrator.

Difficulties of course frequently arose before the Act of Wm. 3 with reference to submissions to arbitration, and there were many powers which the parties could not, by virtue of that mere agreement, exercise as against each other. But the Act of Wm. 3 recognized the fact that when the parties had got their tribunal fixed, and were proceeding to carry out the agreement to refer, they would want the assistance of the Court, and provided that the submission might be made a rule of Court. What was the effect of that legislation? It gave the Court certain powers by which to assist the parties in the trial of the case before the arbitrators to whom they had submitted their disputes. It gave the Court power to enforce the award of the arbitrators. From the time of William III. until the Act of 3 & 4 Wm. 4, c. 42, although the submission was made a rule of Court, either party could revoke it—a power which is wholly and absolutely inconsistent with the idea that the Act of Wm. 3 empowered the Court to order either party to name an arbitrator. It cannot be that after the Court had made an order, which it is now argued must have been obeyed, either party could have exercised a power of revocation; therefore, I am clearly of opinion that the Act of Wm. 3 did not give the suggested power.

Then came the Act of Wm. 4, the effect of which was to make the submission irrevocable in cases where it had been made a rule of Court, and the arbitrators had been appointed. The submission was of course in one sense always irrevocable; but what that Act did was to put an end to the power which had

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been exercised before by the parties, who, although they could not revoke the agreement to submit to arbitration, had been able to revoke the authority of the arbitrator whom they had named. The effect of that legislation, therefore, is, that after the arbitrator has been named his authority cannot be revoked, and the legal phrase used in the Act to express that was, that the submission should be irrevocable. Except in that sense, a submission was always irrevocable; for there was always an action for breach of an agreement to refer.

That being the state of the law at the passing of the Act of 1889, let us consider whether s. 1 has made any alteration. "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge." The phrase is used which had always been used, "a submission shall be irrevocable"; that is to say, the power of the arbitrator cannot be revoked when he has once been appointed. It does not mean that the agreement to refer is irrevocable, because that always was in the true sense of the word irrevocable. The section proceeds: "and shall have the same effect in all respects as if it had been made an order of the Court," which can only mean, "as if it had been made an order of Court before this Act was passed." That is the obvious meaning of the phrase, and, therefore, the only effect of the section is that a submission is to be irrevocable in the sense in which that phrase was used before the Act, and that it is to have the same effect in all respects as if before the Act it had been made a rule of Court. What was that effect? As I have already said, it enabled the Court to assist the parties to carry on their dispute before the arbitrators, when arbitrators were appointed, and to enforce the award after it had been made in the same way as if it had been a judgment of the Court. It is clear that making the submission a rule of Court did not give the power that is suggested before the Act of 1889, and therefore, that Act does not give it.

An argument was used, that the Court had power to attach a person who disobeyed the order of the Court after the submission had been made a rule of Court. That might be so in certain cases, as where a man appointed an arbitrator and then

attempted to revoke his authority, which, if the submission had been made a rule of Court, would be a clear disobeying of the rule; but the making the submission a rule of Court did not direct the party to nominate an arbitrator, and did not give the Court any power to force him to do so by attachment or otherwise. Even if the Court could, before this Act, have attached a party for refusing to appoint an arbitrator, that would not carry the present contention, that the Court has power to order him to appoint an arbitrator. But in my judgment the Court never could have attached him for not nominating the arbitrator; it could only attach him if, after having nominated the arbitrator and after the submission was made a rule of Court, he attempted to revoke the authority of the arbitrator whom he had appointed. The only remedy before this statute against the party who would not appoint an arbitrator was, as I have already said, to sue him for breach of his agreement to do so.

I think that the Divisional Court below was induced to stretch the meaning of s. 1 of the Act of 1889 beyond what it can properly bear, and, therefore, I disagree with their decision, and think that the appeal must be allowed.

LINDLEY, L.J. I am of the same opinion. The question is whether the Court had any jurisdiction to make this order.

Now it seems to be, if not conceded, at all events to be tolerably plain, that until the Act of 1889, at all events, there was no precedent for any such order as this; and when we try to see upon what the jurisdiction to make such an order could be based, it is extremely difficult to find it. The jurisdiction is to be found, if at all, in some words in s. 1 of the Act of Wm. 3, and the argument is put in this way: that by making the submission a rule of Court the submission itself becomes an order of the Court, which the Court can enforce by attachment or otherwise. If that argument were sound, a great many things would follow from it. It would follow that the Court could have done a great number of things in arbitrations which the Court has declined to do over and over again. In the first place, I do not see why the Court should not have been asked to make an order of this sort ages ago. I cannot see why it is consistent

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with any such theory that there should be a total absence of any authority for the enforcement of a submission in the same way that the Court has enforced an award. It has long been settled law that the Court will not grant specific performance of an agreement to refer; but, if this argument is sound, it is difficult to see why there should not have been specific performance of a portion of the agreement—that is to say, why one party should not have had a decree compelling the other party to proceed and appoint an arbitrator. But there is no authority for any such proposition, and the truth is that, however the statute of Wm. 3 might have been expanded, if the argument of Mr. Barnes is right, such a suggestion as is now made is made for the first time.

Now certain consequences follow from making a submission a rule of Court, and it has been held, that although there was no power to prevent revocation of the authority of the arbitrator except under the Act of Wm. 4 and the subsequent statutes, yet there was power to attach a man under the Act of Wm. 3, if he did revoke the appointment of an arbitrator. There is some authority for that in Russell on Arbitration. I believe that costs could be taxed under the rule of Court and an order of attachment enforced; but such consequences as those now suggested never have been attributed to the Act of Wm. 3, and, so far as I can discover, there never has been an order to attach a man for not appointing an arbitrator, and still less an order by the Court to appoint an arbitrator in default of his appointment.

It has been said that the law has been altered in that respect by the Act of 1889; but there is no ground for that contention unless it be based on s. 1; the other sections, namely ss. 4, 5, and 6, do not touch this point. It certainly looks like a blot in the Act, that by reason of there being there no provision as to three arbitrators, as distinguished from two arbitrators and an umpire, ss. 4, 5, and 6 do not apply; but we cannot help that. Now s. 1 says, "A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of Court," and s. 27 interprets

a submission to include a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not. What effect is this submission to have? It is not to be revocable. It is to have the same effect in all respects as if it had been made a rule of Court, and made so before the Act. Then one is thrown back on what is the effect of making it a rule of Court, which I have already dealt with. Such an order as this is opposed to all the practice of the last 200 years, and it appears to me that this appeal must succeed.

BOWEN, L.J. I am of the same opinion. We have to construe the language of s. 1, and I may remark that the word "submission" and the words "revocation of submission" are words which have been used with some inexactitude, both in the cases and in the text-books. There may be an agreement to refer generally without naming the arbitrators; such an agreement was always irrevocable, and an action would always lie for its breach, although the Court could not compel either of the parties to proceed under it. There may be an agreement to clothe a particular arbitrator with authority, and if one of the parties revoked that particular arbitrator's authority, and refused to submit to him, he could not be compelled to proceed. In such a case, though not with exactitude, one might probably talk of revocation of the submission and of the submission as revocable, although it was in truth a revocation of the authority of that arbitrator. The difficulty here arises because in this Act submission is defined as a written agreement to submit to arbitration whether an arbitrator is named or not. Exacter language was used by the legislature in framing 3 & 4 Wm. 4, c. 42, s. 39, which accordingly provides that the power and authority of an appointed arbitrator when the submission has been made a rule of Court shall not be revocable. That shews what is the true thing that is revoked; the party does not revoke the agreement to refer, but revokes the authority which he has given to the arbitrator.

Dealing with the case under the first words of s. 1, the submission is to be irrevocable; and in fact an agreement to refer was never revocable, for an action might have been brought upon

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it in respect of a breach. But so far as the latter words of the clause are concerned, "and shall have the same effect in all respects as if it had been made an order of Court," the meaning must be that the submission, whether it be a general agreement to refer or not, is to have the same effect as would have been given to it before the statute by an act of the parties making it a rule of Court. But making a submission a rule of Court never gave the power of compelling a party to go on and present himself before some arbitrator or another when the arbitrators were not named. The Act of Wm. 4 does not apply; and the truth is, that if the contention of the respondents here is to succeed, we should be giving to these general agreements to refer not merely the same effect as they would previously have had if made orders of Court, but a much larger one.

On these grounds it seems to me impossible to hold that s. 1 of the Arbitration Act, 1889, applies; and it is admitted that if s. 1 does not apply there is no remedy for the respondents in any of the other sections. I think, therefore, that the judgment of the learned judges below was wrong, and that this appeal ought to be allowed.

I wish to say one word as to the power of attaching under the old law, which will be found explained in the judgment of Willes, J., in *In re Rouse and Meier*. (1) It does seem that the party revoking the authority of an arbitrator after the agreement had been made a rule of Court might have been liable to be attached; but that was after the appointment of the arbitrator, and was a punishment for determining or revoking his authority. I can find no trace of any reported case in which a party has been held liable for non-performance of the agreement to refer, or has been attached on that ground, and if it be true, as seems clear, that as a rule agreements to refer were not made rules of Court until after the arbitrator was named (the reason being that until he was appointed the party could not get the costs of the rule), of course one would not expect to find any such case. I am not quite sure that in the case of *In re Rouse and Meier* (1) the agreement was not made a rule of Court before the arbitrators were appointed; but the object of making it a rule of Court was to

(1) Law Rep. 6 C. P. 212.

give the Court power over the arbitration and to enforce the award, not to compel the parties to proceed to arbitration. I do not see how a person could be attached for not performing the agreement even if the agreement was made a rule of Court before the arbitrator was named. Certainly no case of specific performance ever has been heard of in the Courts of Equity, and I never heard and I do not believe anybody else ever heard of attaching a man for not appointing an arbitrator at common law.

*Appeal allowed.*

Solicitors for appellants: *Rowcliffes, Rawle & Co., for Lightbound, Liverpool.*

Solicitors for respondents: *Field, Roscoe & Co., for Bateson, Warr, & Bateson, Liverpool.*

W. J. B.

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[IN THE COURT OF APPEAL.]

*May* 3

HASLEWOOD *v.* CONSOLIDATED CREDIT COMPANY.

*Bill of Sale—Validity—Principal Sum—Repayment by Instalments—Default—Interest, whether payable on whole Principal or on Instalments—Ambiguity—Bills of Sale Act* (1878) *Amendment Act,* 1882, *s.* 9—*Form in Schedule.*

By a bill of sale the plaintiffs assigned to the defendants certain chattels as security for the repayment of "30*l.*, with interest thereon at the rate of 60 per cent. per annum"; and the plaintiffs agreed to pay "the principal sum aforesaid" by monthly instalments, and on the day fixed for payment of the last instalment to "pay the interest which shall have accrued at the rate aforesaid upon the said principal sum; and in case default shall be made in payment of any of the said instalments of the principal sum, the same shall, until payment, continue to bear interest at the rate aforesaid":—

*Held*, that the words "the same" must be taken to refer to the "instalments" and not to the whole "principal sum," and that any instalment unpaid on the day fixed bore interest until the day of payment only, and not afterwards:

*Held*, also, that the bill of sale was not, in point of form, such a departure from the form in the schedule to the Bills of Sale Act (1878) Amendment Act, 1882, as to render it void.

Decision of Divisional Court reversed.

APPEAL from a judgment in the Mayor's Court, London, in an action to try the validity of a bill of sale.

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By a bill of sale dated March 6, 1889, and made between the plaintiffs, Henry Thomas Haslewood and Louisa Haslewood his wife (thereinafter called "the mortgagors"), of the one part, and the defendants, the Consolidated Credit Company, Limited (thereinafter called the mortgagees"), of the other part, it was witnessed that in consideration of 30*l.* by the mortgagees then paid to the mortgagors (the receipt, &c.), they the mortgagors thereby assigned to the mortgagees the several chattels and things specifically described in the schedule thereto annexed, and being in or about the mortgagors' dwelling-house, by way of security for the payment of the sum of 30*l.*, and interest thereon at the rate of 60 per cent. per annum. And the mortgagors agreed and declared that they, or one of them, "will pay to the mortgagees the principal sum aforesaid by the instalments following, that is to say, the sum of 5*l.* on the 9th day of March instant, 2*l.* on the 6th of April, 1889, and the sum of 2*l.* on the 6th day of every succeeding month until the 6th day of February, 1890, and the balance of the said principal sum on the 6th of March, 1890, and will on the said 6th of March, 1890, also pay the interest which shall have accrued at the rate aforesaid upon the said principal sum; and in case default shall be made in payment of any of the said instalments of the principal sum, the same shall, until payment, continue to bear interest at the rate aforesaid." Then followed a covenant by the mortgagees to insure the chattels, and a clause enabling the mortgagees, in case the mortgagors should "make default in payment of the money hereby secured," or in other events therein mentioned, to enter upon the premises and seize and take possession of the chattels and remove and sell the same.

On June 15, 1889, one of the instalments being in arrear, the defendants put a man in possession. A dispute then arose as to the amount due under the bill of sale, and ultimately the plaintiffs brought an action against the company in the Mayor's Court claiming 50*l.* damages for wrongful distress and trespass, the plaintiffs contending that the bill of sale was altogether void as not being in conformity with the provisions of the Bills of Sale Acts, 1878 and 1882.

The action came on for trial before the Recorder on November

16, 1889, when the plaintiffs were non-suited, and judgment was entered for the defendants. The plaintiffs then appealed to the Queen's Bench Division.

1890. Feb. 25 *Candy, Q.C.*, and *Russell Biggs*, for the plaintiffs.

*Cock, Q.C.*, and *Herbert Reed*, for the defendants.

LORD COLERIDGE, C.J. In this case we have to decide whether a bill of sale is good. It must be admitted that the decisions of the Courts have invited a departure from the form in the schedule to the Act of 1882. If that form had been followed strictly, it seems to me that nine-tenths of the difficulties which have arisen in these cases would have been avoided. Here, it is admitted, that the bill of sale is not "in accordance with the form in the schedule," if those words mean that the bill of sale must follow the form literally; but the decisions have established that it is "in accordance" with the form if it follows the form in substance. I am of opinion that this bill of sale is not substantially in accordance with the statutory form. The stipulation as to repayment is that the grantees shall pay the principal sum advanced, with interest thereon at 60 per cent., by monthly instalments extending over a year, and shall on the day appointed for the payment of the last instalment also pay the interest "which shall have accrued at the rate aforesaid upon the said principal sum"—that is, as I read it, upon the 30*l.* which had been advanced. The fair, reasonable, and obvious meaning of that is, I think, that the whole interest upon the whole sum advanced shall be payable in a lump sum on the day fixed for the payment of the last instalment. If so, it follows that upon considerable portions of the 30*l.* interest at a much higher rate than 60 per cent. would have to be paid, because, assuming that the instalments had been regularly paid, thus reducing, during the current year, the principal sum advanced, interest on the whole principal sum at the rate of 60 per cent. would have to be paid at the end of the year, although a great portion of it had been paid off. I do not deny that it is possible to construe the bill of

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sale in another way—namely, that interest at the rate of 60 per cent. is to be paid, on the day fixed for payment of the last instalment, upon so much of the principal sum as then remains unpaid, and that the interest upon the whole sum advanced is to be diminished pro rata, by deducting interest at 60 per cent. upon each instalment that has been paid during the year; but I do not think that that is the plain and obvious construction of the bill of sale. It is not the reasonable or the true interpretation of what the parties meant, and on that ground I think the bill of sale is bad. It goes on to say, "in case default shall be made in payment of any of the said instalments of the said principal sum, the same shall, until payment, continue to bear interest at the rate aforesaid." That is to say, that, if any instalment has not been paid at the stipulated time, the whole 30*l.* shall, as a penalty for the instalment not being paid, "continue to bear interest at the rate aforesaid," namely, at 60 per cent. Though I am not so clear as to the effect of this clause, I am inclined to agree with the view taken by the Master of the Rolls that the words "the same shall, until payment," &c., mean that the whole principal sum shall, until payment, continue to bear interest at 60 per cent. Here, again, I do not deny that it is possible to construe the words "the same" as referring to the instalments, and not to the whole principal sum. I am of opinion, therefore, upon both grounds, that this bill of sale was void; that the judgment of the Recorder of London was wrong, and that there should be a new trial.

LORD ESHER, M.R. The sole question we have to determine is whether this bill of sale is, or is not, void, as not being in accordance with the form in the schedule to the Bills of Sale Act, 1882. In the form given in the schedule certain variations, indicated by words printed in italics within brackets, were allowed, and further, the Court of Appeal has held that if, though there is a variance from the form, that variance leaves the bill of sale to have the same legal effect as the form, then it is not an effective variance so as to make the bill of sale void. We have, therefore, to see whether the bill of sale in question is of the same legal effect as the form. It cannot be denied

that the bill of sale in question does differ from the form. It does not, to begin with, provide for payment of the principal and interest by equal instalments; but I am of opinion that that is not a variation from the form which would make the bill of sale void. I am of opinion also, that if the only objection had been that all the interest was payable on the day fixed for payment of the last instalment, that would not have been a sufficient objection. It seems to me, however, that if people will draw a bill of sale in a form which varies from the statutory form, it lies upon them to shew that it has the same legal effect as the statutory form. If, therefore, the grantees in this case cannot shew what the real and plain construction of the instrument is, then they cannot shew that it has the same legal effect as the form in the schedule to the Act. If, with respect to the clause providing for payment of interest, it is doubtful upon what sum interest is to be paid; if it is doubtful whether interest at the rate of more than 60 per cent. is charged; if the clause is calculated to mislead the borrower, then it has not the same legal effect as the form. I agree with the Lord Chief Justice, that the clause with respect to the payment of interest leaves it doubtful upon what sum interest is to be paid. It is doubtful whether the words "which shall have accrued upon the said principal sum" mean that interest at 60 per cent. shall be paid on the whole sum for the period which elapses between the execution of the bill of sale and the payment of the first instalment, and then that interest at 60 per cent. shall be paid at the end of each month, upon so much of the principal sum as remains unpaid, or whether the words mean that the interest on the whole principal sum is to go on accruing until the day fixed for payment of the last instalment, and then become payable. The clause goes on to say, that "in case default shall be made in payment of any of the said instalments of the principal sum, the same shall, until payment, continue to bear interest at the rate aforesaid." Does "the same" refer to the last antecedent, namely, the principal sum; or does it refer to the instalments? I cannot say which is the true meaning, but I am inclined to think that "the same" refers to the principal sum. Grammatically the words "the same" would refer to the last antecedent

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In my opinion the bill of sale is doubtful and obscure; it does not follow the statutory form, and because of its doubt and obscurity, it is impossible to say that is has the same legal effect. I therefore hold that this bill of sale is void, and the results pointed out by the Lord Chief Justice must follow. (1)

W. A.

April 18. The defendants appealed.

*Sir Horace Davey, Q.C., Cock, Q.C., Herbert Reed,* and *Carrington,* for the defendants. There is no ambiguity in the bill of sale; it provides that the principal is to be paid by certain instalments, and that, instead of interest being paid from time to time, the whole interest which has accrued is to be paid at the end. Interest is only payable on what is owing, so that, as each instalment of principal is paid, the debt is diminished, and interest has to be calculated thenceforth on a less sum. The Lord Chief Justice thought the true construction to be that interest was to run on the whole 30*l.* till all the instalments were paid. The Master of the Rolls did not hold that to be the true construction, but thought that it was a fairly arguable one, and that the bill of sale was void as departing from the statutory form in such a way as to make the effect of the instrument doubtful. It has been held that the form in the Act need not be followed verbatim: *In re Cleaver, Ex parte Rawlings* (2); and, if the defendants' construction of the bill of sale is the true one, it can hardly be disputed that it is valid. The Act requires the time for payment of interest to be stated in the deed, and that has been done. The clause which provides that if any instalment is not paid at the time it shall continue to bear interest until payment, shews that, if it is paid, the interest stops. To construe "the same" as referring to the principal is a most unnatural construction—it manifestly refers to the instalment in

(1) The case of the *Consolidated Credit and Mortgage Company* v. *Withers* was argued at the same time. It was an appeal from the decision of the judge of the Bow County Court, who held that a bill of sale in the same form was void. The result of the judgment of the Divisional Court, therefore, was to uphold his decision.

The same counsel appeared.

*Goldstrom* v. *Tallerman* (17 Q. B. D. 80; 18 Q. B. D. 1), and *In re Cleaver, Ex parte Rawlings* (18 Q. B. D. 489), were referred to during the arguments.

(2) 18 Q. B. D. 489.

arrear. It was argued that it was for the defendants to shew that the bill of sale has the same legal effect as the scheduled form. If this means that it must be shewn that the bill of sale provides for payment by equal instalments, of course it does not: but the true construction is, that the Act only meant to provide that it should be distinctly stated at what times the principal and interest were to be paid; and the bill of sale satisfies this requisition. It is not according to sound principle to say that a bill of sale is void because there is some obscurity in it; the Court must construe it; and if, according to the construction which the Court puts upon it, it is valid, then it must be enforced. This bill of sale complies with the statutory form, for the words in the form "[or whatever else may be the stipulated times or time of payment]," are part of the form.

*Candy, Q.C.*, and *Russell Biggs*, for the plaintiffs. The Court of Appeal has held that to follow the statutory form substantially is enough; but here it has not been substantially followed. The bill of sale is open to two constructions, one of which would be adopted by a lawyer, but the other would be the one which an unprofessional person would be most likely to take. It is to the advantage of the borrower to have it made clear and simple what interest he has to pay; it is for the advantage of the lender to have the ascertainment of it made doubtful and difficult. The legislature in the Bills of Sale Act was looking to the protection of the borrower only; the lender did not need protection. If the lender departs from the statutory form it lies on him to shew that the departure is immaterial. If the lender departs from the statutory form he must use a form which will enable the borrower to calculate without difficulty what he has to pay, and when. If a bill of sale of such an ambiguous character as this is held valid, the very evil against which the legislature intended to guard is let in. The Lord Chief Justice goes so far as to adopt the construction that interest runs on the whole sum till all the instalments have been paid. The Master of the Rolls does not adopt that construction, but holds it to be a possible and not unreasonable one; and certainly, if the draftsman had intended to use language which would in all probability be misunderstood, he could not have succeeded better. The plaintiffs

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contend that, leaving on one side the question what is the true construction, the judges below were right in holding this deed void on the ground that it substantially departed from the statutory form by the introduction of terms calculated to deceive.

*Sir H. Davey*, in reply. The plaintiffs are seeking to embody in the Act a fresh provision—that every bill of sale must be so clearly in accordance with the statutory form that no person however ignorant can misunderstand it. But if the deed is substantially according to the statutory form it must be supported.

*Cur. adv. vult.*

THE COURT (Lindley and Bowen, L.JJ.), having referred to the decision in *Goldstrom* v. *Tallerman* (1), afterwards ordered the appeal to be restored to the paper for re-argument.

1890. May 5. The appeal was re-argued before the full Court (Cotton, Lindley, and Bowen, L.JJ.).

The counsel for the plaintiffs were first called upon, Lindley and Bowen, L.JJ., observing that in *Goldstrom* v. *Tallerman* (1) the same arguments which had been urged against the bill of sale in the present case had been held to be untenable.

*Candy, Q.C.*, and *Russell Biggs*, for the plaintiffs, repeated the arguments adduced by them on the previous hearing, contending that the bill of sale was so obscure in its construction, and so substantially different from the statutory form, that it could not be sustained. In addition to the authorities referred to on the former occasion, they cited *Melville* v. *Stringer*. (2)

*Sir Horace Davey, Q.C., Cock, Q.C., Herbert Reed*, and *Carrington*, for the defendants, were not called upon.

COTTON, L.J. I have not had the advantage which my learned brothers have had of hearing this case discussed twice over, but I am prepared to give judgment on what I think is the true construction and effect of this bill of sale.

The main point pressed upon us was that a bill of sale ought to be clearly expressed, and that if it differs in any way from the

(1) 18 Q. B. D. 1. (2) 13 Q. B. D. 392.

form given in the schedule to the Bills of Sale Act it ought to be in such terms that no lawyer, or no educated person—no "instructed person" I think were the words used—need to be consulted in order to ascertain what is the true effect of the document. I would deal with that point if it were necessary to do so; but I think that the decision of the Court of Appeal in *Goldstrom* v. *Tallerman* (1) entirely gets rid of the necessity of doing so. There, as I understand, the Divisional Court had put a construction on the clause in the bill of sale before them which they said made it bad; and then the matter came before the Court of Appeal, consisting of the Master of the Rolls, Bowen and Fry, L.JJ. The judgment of the Court was delivered by Fry, L.J., and he is the judge of the Court of Appeal who, I think, most strongly leans to the view that any deviation that produces a material legal difference will make the bill of sale bad. The Court, in their judgment delivered by him, put a different construction on the clause which the Divisional Court had considered as making the bill of sale bad, and they held that the bill of sale was good. That gets rid of all the argument in the present case. In the case referred to, the Divisional Court, consisting of two judges—certainly instructed minds, and judges competent to decide such questions as this—had come to the conclusion that the true construction of the particular clause was such as to make the bill of sale bad. The Court of Appeal came to a different conclusion; but they did not say that, because an appeal was necessary, and because they differed from the judges in the Divisional Court, that raised such an ambiguity and such doubt that the bill of sale was bad. And, therefore, I think there is no necessity to go into the question as to whether, if we differ from the view taken by the Divisional Court here, although it was composed of the Lord Chief Justice and the Master of the Rolls, that is in itself sufficient to make the bill of sale bad. Here I will assume that it is necessary that we should be appealed to in order to decide what is the true effect and construction of this bill of sale; and I understand that there was a difference of opinion as to the validity of a bill of sale in this form between two judges from whom there were appeals to the Divisional Court, one

(1) 18 Q. B. D. 1.

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holding that the bill of sale was bad, and the other that it was not. I do not think, however, that we ought, upon the mere ground that there has been a difference of judicial opinion, to come to the conclusion that the bill of sale is bad. We must see what is the true construction of this bill of sale; and although I do find that both the judges of the Divisional Court did express an opinion that the particular clauses referred to were of such doubtful meaning as to render the bill of sale bad—though I am a little doubtful whether either of them laid down what was the true construction of this instrument—they certainly did use language from which I must differ.

Now, what are the clauses on which they say there is such doubt here as to prevent this bill of sale being good? First of all, there is this clause—"and will on the said 6th day of March, 1890, also pay the interest which shall have accrued at the rate aforesaid upon the said principal sum." I quite agree that there is no interest to be paid till that day. But then, is there any substantial departure from the form in using these words? It does not say, "the interest due," but "the interest which shall have accrued." I do not think that it can reasonably be contended that there is a substantial departure.

Then, what is meant by "which shall have accrued"? It would not be right to say that that does not take into account sums which have been paid off, and that interest is to be considered as accruing still in respect of those sums down to that day —March 6, 1890—although a considerable portion of the money had been paid off at a long antecedent period. The meaning is this: you must see what, on that day, the interest is on the principal sum—it is only 30*l.*; but then you must strike off from that portion of the principal sum which bears interest, and on which interest is to be taken as accruing down to that date, the sums which have been paid by way of instalments, and one would assume that those instalments had been regularly paid. If a lawyer may in any way interpret this, I should say that the next clause makes that quite plain—"and in case default shall be made in payment of any of the said instalments of the principal sum, the same shall, until payment, continue to bear interest." That indicates that, but for that clause, the instalments would not bear interest. There is a difficulty raised as regards that

clause. One knows that the Master of the Rolls and the Lord Chief Justice are educated men, and men who understand grammar and who know the law; but I cannot agree with what, I think, was principally the view of the Master of the Rolls, namely, that the words "the same" ought to be read as having for their antecedent "the principal sum." The words "the principal sum" are introduced simply ex abundante cautelâ, to shew what is meant by "instalments." The word "instalments" is the real antecedent to which the words "the same" are to be referred. The words "of the principal sum" are introduced, not as being the principal word in that sentence, or the antecedent to which the words "the same" are to be referred, but simply to define more particularly what the word "instalments" refers to, namely, "instalments of the principal sum." "Principal sum" cannot in my opinion—not as a matter of law, but as a matter of grammar—be considered as the antecedent in the sentence to which "the same" is to be referred.

Therefore, although I am expressing my opinion—I will not say with hesitation, because I have no hesitation—but with a feeling that I am differing from two judges of high position, yet, in my opinion, there is no doubt as to what is the true meaning of this clause; and although the argument is pressed upon us that, if there is any necessity for legal advice as to what is the true construction of it, that must make the bill of sale bad, yet that argument, I think, is got rid of by the case to which I have referred of *Goldstrom* v. *Tallerman*. (1) I think the decision in that case was right, and it is not for us now to dispute it. Therefore, although we differ from the Divisional Court, and there has been a difference of judicial opinion as to what the true meaning of this bill of sale is, in my opinion the true meaning is sufficiently clear, and this bill of sale ought not to be declared bad and void. In my opinion, the appeal succeeds.

LINDLEY, L.J. The only difficulty which I have felt in this case has arisen from the fact that the Lord Chief Justice and the Master of the Rolls put upon this bill of sale a construction which I cannot think is the true one.

Now, the first question is, what is the construction of this bill

(1) 18 Q. B. D. 1.

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of sale? It is a money-lender's bill of sale. It is a stipulation for a security for the repayment of 30*l.* by instalments, which are not equal in amount, with what money-lenders call 5 per cent. interest—that is, 5 per cent. per month—60 per cent. per annum. There is an express clause in it which says that, if any instalment is in arrear, that instalment is to bear interest at the high rate of 60 per cent. That is put in for the purpose of making it part of the contract that if an instalment is not met it shall bear that high rate of interest—not such interest as a jury might be disposed to give by way of damages. I shall have something to say presently upon the validity of such a bargain; but that is the bargain. I cannot come to the conclusion that there is any real doubt or ambiguity upon this bill of sale, when you understand the nature of the transaction. Everybody must bring to a bill of sale a knowledge of the ordinary principles of borrowing and lending. If I borrow 50*l.* and promise to repay it with interest at 5 per cent. or 60 per cent. or at any other rate, the interest accrues and is payable only in respect of so much of it as is not paid. You pay interest in respect of principal money which you still retain—not upon that part of it which you have already paid to the lender. There is no common sense in a suggestion to the contrary; and to put a construction upon an instrument of loan which will impose upon the borrower an obligation to pay interest on money which has been already repaid is, to say the least, to put upon such a document an unreasonable construction—unless, of course, you are driven to it by terms which, if they exist, would shew a most oppressive and unusual bargain. But it is not the reasonable construction of a document, even if it is ambiguous—which I do not think this is.

Now, having said that, let us see what it is that is supposed to create a difficulty. I will take the clauses one by one.

First of all, there is the clause that, in case any instalment be unpaid at the proper time, it shall bear interest at 60 per cent. That is not in the form in the Act, but it is part of the bargain in this case. Is it contrary to the form? Is it in accordance with the form? Does such a stipulation as that render the bill of sale bad? That is an important question; but it has been set at rest by the case of *Goldstrom* v. *Tallerman* (1), in which it

(1) 18 Q. B. D. 1.

was distinctly held that, if you stipulate for a high rate of interest upon an instalment which is not paid at the date agreed for payment, that is not such a departure from the form as to render the bill of sale bad.

Then it is said that the clause which stipulates for 60 per cent. upon the instalment is obscurely worded. The mortgagors agree that they will "pay the interest which shall have accrued at the rate aforesaid upon the said principal sum"—that is obviously upon the 30*l.*—"and in case default shall be made in payment of any of the said instalments of the principal sum, the same shall, until payment, continue to bear interest at the rate aforesaid." Now it is said that that is capable of this construction—that you shall pay 60 per cent. interest upon the whole 30*l.*, even if you make default in paying only one instalment. It turns on the meaning of the word "same." I confess I cannot read the word "same" as applicable to the 30*l.* The word "same," to my mind, is (I should have said obviously) referable to the antecedent "instalments of the principal sum." Any other construction is at variance with the principle which underlies all transactions of borrowing money.

Then we must notice this, that this bill of sale, unfortunately, I think, has not stated on the face of it what the total amount of interest is which will become payable, assuming the instalments are duly paid. It is capable of easy calculation. I think Mr. Candy told us it came to 8*l.* 10*s.* 9*d.* It would have been very much better if that sum had been put in, because that would have got rid of all possible doubt. But it has not been put in. Is that a defect, or such a defect as will render this bill of sale bad? That point, again, is covered by authority. It is covered by *In re Cleaver, Ex parte Rawlings* (1), which shews that a bill of sale is not void as not being in accordance with the form merely because the actual amount of interest which will be payable according to the contract is not expressed in figures, but is left to calculation. No doubt it would be far better if it were put in—that would make it plain enough.

Now I come to the last difficulty, which is, that the Divisional Court has said that this bill of sale is, to say the least of it, obscure, and that it can—and one of the members of the Court

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said that in his opinion it did—properly bear a different construction. That is what has created a difficulty in our minds. How is that got over? That difficulty has had to be faced before now. It was precisely one of the difficulties met in *Goldstrom* v. *Tallerman.* (1) In that case the Divisional Court construed the bill of sale as possibly open to this construction—that it made the interest (there it was 60 per cent.) payable upon some arrears of interest. One of the judges seems to have thought it did mean that. The other judge thought that, if it did not mean that, at all events it was so worded that it might mean it. That was precisely the position of affairs. How did the Court of Appeal deal with that? They considered that the Divisional Court was erroneous in that respect—that the bill of sale was not reasonably open to that construction; and they did not hesitate to say so.

So here, I think, it is our bounden duty to say that we consider the construction put on this bill of sale by the Divisional Court is erroneous, and that, having regard to the cases which I have referred to, and which seem to me to cover every doubtful point, we ought to hold that this bill of sale is valid, and that the appeal ought to be allowed, with costs.

BOWEN, L.J. I am of the same opinion. I put the same construction that Cotton, L.J., and Lindley, L.J., do upon this bill of sale. The truth is, as it seems to me, that the Court below took the view they did because they did not consider the case of *Goldstrom* v. *Tallerman.* (1) I attribute, accordingly, the variance of our judgment pronounced to-day from the view taken by the Lord Chief Justice and the Master of the Rolls to the fact that we have had the case of *Goldstrom* v. *Tallerman* (1) in our minds, which they had not.

*Appeal allowed.*

Solicitors: *Evans & Batchelor; J. Hopkins.*

G. I. F. C.

(1) 18 Q. B. D. 1.

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**ADULTERATION**—*continued.*
have authority by law to make any order for the payment of money or otherwise, then "it shall be lawful for such justice or justices to issue his or their summons directed to such person," requiring him to appear before a justice or justices to answer thereto.—By 38 & 39 Vict. c. 63 (The Sale of Food and Drugs Act, 1875), s. 6, "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty . . . ." By s. 20 every penalty imposed by this Act shall be recoverable in the manner prescribed by 11 & 12 Vict. c. 43.—By 42 & 43 Vict. c. 30, s. 10, "in all prosecutions under 38 & 39 Vict. c. 63, and notwithstanding the provisions of s. 20 of the said Act, the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug, for the sale of which in contravention to the terms of the principal Act the seller is liable to prosecution, and particulars of the offence or offences against the said Act of which the seller is accused, and also the name of the prosecutor, shall be stated on the summons, and the summons shall not be made returnable in a less time than seven days from the day it is served upon the person summoned."—A complaint having been made to two justices of a borough against the appellant for an offence under the above Acts, a summons was signed and issued by another justice, who had not heard the complaint, and was served on the appellant. The appellant thereupon appeared before the stipendiary magistrate of the borough, but objected that the summons was invalid and the magistrate had no jurisdiction to hear the case. The magistrate being of opinion that the defect, if any, in the summons was cured by the appearance of the appellant, heard the case and convicted him:—*Held*, that the summons, having been signed and issued by a justice who had not heard the complaint, was invalid; that the defect was not cured by the appearance

**ADULTERATION**—*continued.*
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2. —— *Appeal to Court of Appeal—"Criminal Cause or Matter"—Committal of Bankrupt for Contempt of Court—Wilful Failure to deliver up Property to Trustee—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 24 (4), *s.* 104 (2)—*Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 47.] Sub-s. 2 of s. 104 of the Bankruptcy Act, 1883, provides that "orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows," and proceeds to specify the Courts to which different appeals are to be brought:—*Held*, that, by virtue of this sub-section, a bankrupt is entitled to appeal against an order under sub-s. 4 of s. 24 of the Bankruptcy Act, 1883, committing him for contempt of Court, for wilful failure to deliver up to the trustee in his bankruptcy property forming part of his estate. In re Ashwin. Ex parte Ashwin C. A. 271

3. —— *Discharge of Bankrupt—Power of Court to refuse, suspend, or impose Conditions—Circumstances to be taken into consideration—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28.] Under s. 28 of the Bankruptcy Act, 1883, the Court has an unlimited discretion to grant or refuse a bankrupt his discharge, or to suspend the discharge, or to grant a conditional discharge, except in the cases in which that discretion is expressly limited by the proviso to s. 28. In the exercise of that discretion the Court may take into consideration any conduct or affairs of the bankrupt relevant to the bankruptcy, and is not limited to the consideration of the matters mentioned in sub-s. 3 of s. 28 or in s. 24.—*In re Betts & Block* (19 Q. B. D. 39) explained. In re Barker. Ex parte Constable. In re Jones. Ex parte Jones - - - - - - C. A 285

4. —— *Discharge of Bankrupt—Suspension—"Undue Preference" given to a Creditor—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 28, *sub-s.* 3 (*f*), *s.* 48.] By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 28 (2), and (3) (*f*), the Court shall either refuse the bankrupt an order of discharge, or suspend the operation of the order, or grant an order of discharge subject to conditions, on proof that he has, within three months preceding the date of the receiving order, when unable to pay his debts as they became due, given an "undue preference" to any of his creditors:—*Held*, that this section has a wider operation than s. 48, and applies to acts which could not be avoided as "fraudulent preferences" under the latter section.—A debtor had mortgaged his house and premises to three mortgagees in succession, and was in insolvent circumstances. On January 22, the first mortgagee served him with a writ in an action on his covenant to pay the mortgage debt and interest. He did not

**BANKRUPTCY**—*continued.*

appear to this writ. On January 24, the second and third mortgagees served him with similar writs, and on the next day he took these writs to the solicitors of the first mortgagee, and asked them to do what was necessary for him. They entered appearances for him to both the writs. On January 31 the first mortgagee obtained judgment in his action, and on February 7 the sheriff levied execution under this judgment. On February 8 the third mortgagee obtained judgment in his action, and on the same day the sheriff levied execution under this judgment. On March 6 a receiving order was made against the debtor, and he was afterwards adjudicated a bankrupt.—*Held*, that, by taking the writs to the solicitors of the first mortgagee, the bankrupt had given that mortgagee an "undue preference" within the meaning of s. 28. IN RE SKEGG. EX PARTE SKEGG - - C. A. 505

5. —— *Proof—Contingent Liability—Creditor's Estimate—Trustees' Assent—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37—*Sched. II., r.* 2—*Bankruptcy Rules*, 1886, *rr.* 219, 228.] There is nothing in the Bankruptcy Act, 1883, or in the rules made under the Act, to warrant the conclusion that any limit is imposed to the time within which the trustee may reject a proof or claim in respect of a contingent liability.—A debtor covenanted by deed to pay B during her life an annuity of 1440*l.* per annum, and subsequently became bankrupt. B. carried in a proof against the estate of the bankrupt for a sum which was admittedly the actuarial value of her annuity at that time. The trustee admitted the proof for voting purposes, and did nothing further. Some months afterwards B. died before any dividend had been declared:—*Held*, that the trustee had not assented to the valuation which B. had placed on her annuity, and that he was entitled to reduce the proof to the actual amount of the instalments of the annuity due to her at the date of her death. IN RE DODDS. EX PARTE VAUGHAN'S EXECUTORS. [529

6. —— *Leasehold Interest of Bankrupt—Disclaimer by Trustee in Bankruptcy—Mortgage by Underlease—Assignment by Mortgagee to Trustee for Himself—Vesting Order—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 55, *sub-s.* 6.] A bankrupt being lessee of premises, the trustee in the bankruptcy, with the leave of the Court, disclaimed the lease. The bankrupt had mortgaged the premises by way of underlease, and the day before the application for leave to disclaim was heard the mortgagees assigned the mortgage debt and the security to a nominee of their own (a person of small means), who was to hold the property for the residue unexpired of the term of the underlease, subject to the subsisting equity of redemption. The deed of assignment contained a declaration by the assignee that he would stand possessed of the debt and the security in trust for the assignors, and to be assigned and disposed of as they might direct. The assignment was made for the purpose of escaping liability under the lease:—*Held*, that, notwithstanding this assignment, the assignors still remained "mortgagees by demise" of or "entitled to" the leasehold property within the meaning of sub-s. 6 of s. 55 of the Bankruptcy Act, 1883, and that they must be excluded from all interest in, and security upon, the property, unless they were willing to accept a vesting order as provided by sub-s. 6. IN RE SMITH. EX PARTE HEPBURN - - - - C. A. 536

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**BILL OF SALE**—*continued.*

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**BILL OF SALE**—*continued.*

defendant as security for his advance, and that the sheriff's officer should hold the goods on behalf of the defendant. This agreement was reduced into writing, and signed by the owner of the goods, and the sheriff acquiesced, and his officer retained the custody of the goods on behalf of the defendant:—*Held* (by Lindley and Lopes, L.JJ., Lord Esher, M.R., dissenting), that the document was not merely a record of the pledge, but was essential to the proof of the defendant's title to possession of the goods, and a bill of sale within the definition in s. 4 of the Bills of Sale Act, 1878. *Ex parte Hubbard* (17 Q. B. D. 690) distinguished. MILLS *v.* CHARLESWORTH [C. A. 421

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**CHARITY** — Charitable Institution — Common lodging house—Liability for keeping—Non-registration - - - 87
*See* COMMON LODGING HOUSE.

**CHARTERPARTY**—Incorporation of conditions of charterparty in bill of lading - 501
*See* SHIP. 3.

**CHATTEL** — Gift without delivery—Passing of property to donee - - - 57
*See* GIFT.

**CHURCHWARDEN** — Maintenance of disused churchyard or burial-ground — Repayment of costs and expenses—Certificate of churchwarden - - - 523
*See* ECCLESIASTICAL LAW.

**COAL, SALE OF**—Weights and measures—Coal in course of delivery to purchaser—Representation by servant of seller - 412
*See* WEIGHTS AND MEASURES.

**COMMITMENT, ORDER OF**—Debtor taken to prison within twenty-four hours of arrest—Attachment for debt - 183
*See* SHERIFF.

**COMMON LODGING HOUSE**—*Liability to Penalty for keeping—Charitable Institution — Non-registration — Common Lodging Houses Act,* 1851 (14 & 15 *Vict. c.* 28)—*Common Lodging Houses Act,* 1853 (16 & 17 *Vict. c.* 41).] Sect. 3 of the Common Lodging Houses Act, 1853, provides that "a person shall not keep a common lodging house or receive a lodger therein until the house has been inspected and approved for that purpose by some officer appointed in that behalf by the local authority, and has been registered."—The appellant opened and kept a lodging house for the reception of male lodgers, who slept in one common room capable of accommodating 100 persons. The lodgers were charged, at the discretion of the manager, a sum not exceeding 4*d.* per night for bed, supper, and breakfast; but the house was maintained, not for the purpose of gain, but for the accommodation of the poorest class of persons only, partly with a charitable and partly with a religious object. The house had not been inspected or approved by the officer of the local authority, nor was it registered. The appellant having been summoned and convicted for keeping a common lodging house in contravention of the provisions of the above section:—*Held,* that the house, being maintained as a charitable institution and not for purposes of gain, was not a common lodging house within the meaning of the Act, and that the conviction could not be supported. BOOTH *v.* FERRETT - 87

**COMPANY** — *Sale of Shares — Certification of Transfer—Voucher of Title—Want of Title in Transferor—Estoppel—Act Ultra vires—Representation as to Credit or Ability—Signature of Party to be Charged—Lord Tenterden's Act* (9 *Geo.* 4, *c.* 14), *s.* 6] The defendants were a company, incorporated under the Joint Stock Companies Acts, who had issued the whole of their authorized share capital. Subsequently to the completion of such issue L. sold to the plaintiffs, through stockbrokers, a certain number of shares in the defendant company. The brokers took the document, by which it was intended to transfer such shares from L. to the plaintiffs, before it had been executed by the plaintiffs or the price had been paid, to the office of the defendants, and procured the defendants to place upon it (partly by means of a stamp, partly in writing) the following words: "Certificate lodged. The Balkis Consolidated Company, Limited. J. V. Thomas, for Secretary" The placing of such words upon a transfer was commonly known as "certification" of the transfer; and it was in the ordinary course of the defendants' practice to grant such certification, if required to do so and if satisfied that the transferor was entitled to the shares specified in the transfer. The brokers, having obtained such certification and acting upon the faith of it, as the agents of the plaintiffs paid L. the price of the shares. The defendants subsequently discovered that L. had had no title to the shares specified in the transfer, and thereupon, notwithstanding their certification of the transfer, refused to recognise the plaintiffs' title to the shares. The plaintiffs having brought an action to recover the value of the shares, the judge found as a fact that the certification of the transfer was a representation

COMPANY—*continued.*

by the defendants that a genuine certificate, covering the shares denoted by the numbers in the transfer, had been lodged with them, and that L. had a good title to the shares, and further that such representation was made with the intent that a subsequent purchaser of the shares should act upon it:—*Held*, that the action could not be maintained, upon the grounds—1. That the certification was ultrà vires, and—2. That it was a representation as to the credit and ability of L. within the 6th section of Lord Tenterden's Act, and, not being under the seal of the defendants, could not bind them. Bishop *v.* Balkis Consolidated Company. [*See next case*] 77

2. —— *Sale of Shares—Certification of Transfer—Voucher of Title of Transferor—Estoppel—Act Ultrà Vires—Representation as to Credit or Ability—Lord Tenterden's Act* (9 *Geo.* 4, *c.* 14), *s.* 6] P., a shareholder in the defendants' company, transferred his shares to a purchaser, and his share certificate was lodged with the company to enable such purchaser to complete his title. P. subsequently purported to transfer a portion of the shares to another purchaser, who again sold, and executed a transfer of the shares to the plaintiff. Such last-mentioned transfer was "certificated" by the defendants' secretary, in the manner usual upon the transfer of shares, by placing upon it the words "certificate lodged," although no certificate was in fact lodged in respect of such transfer; and upon the faith of such "certification" the plaintiff paid the price of the shares. The defendants subsequently refusing to recognise the plaintiff as the owner of the shares, he brought his action to recover their value from the defendants:—*Held*, that such a "certification" could only be taken to amount to a representation by the defendants that a document or documents had been lodged with them apparently in order, and shewing primâ facie that the transferor was entitled to the shares, i.e., either what purported to be a certificate that he was the registered owner of the shares, or what purported to be a certificate that some one else was such owner, accompanied by a document or documents purporting to transfer the shares from such person to the transferor; but that such "certification" did not import a warranty of the transferor's title or of the validity of such document or documents; that it did not therefore estop the defendants from impugning the plaintiff's title on the ground of the invalidity of the transfer to the plaintiff's transferor: that the plaintiff could not therefore make a title to the shares against the defendants by estoppel; and that, as no action would lie against the defendants for a careless misrepresentation without fraud, the plaintiff could not recover.—So *held*, affirming in the result the judgment of Vaughan Williams, J., in the Court below (ante, p. 77), but dissenting from the opinion expressed by him that the "certification" was ultrà vires on the part of the company, and that it was a representation as to credit or ability within s. 6 of Lord Tenterden's Act. Bishop *v.* Balkis Consolidated Company - - - C. A. 512

3. —— *Directors acting ultrà vires—Liability for Acts of co-Directors—Building Society—Advances on Security of Shares—Building Societies Act*, 1874 (37 & 38 *Vict. c.* 42).] The directors of a building society passed a resolution authorizing advances to members on the security of their shares. The plaintiff, who was a director, concurred in this resolution. An advance was accordingly made to a member on the security of his shares, and the society thereby incurred a loss. The plaintiff was no party to making this advance. In an action by the plaintiff to recover from the society deposits made by him, the defendants counter-claimed in respect of the loss which they had incurred, on the ground that the advance was ultrà vires, and was attributable to the illegal resolution which authorized such advances:—*Held*, that the plaintiff was not liable, for the cause of the loss was the wrongful act of the directors who made the advance, who were not the servants or agents of the plaintiff, and for whose acts the plaintiff was not liable.—*Pickering* v. *Stephenson* (Law Rep. 14 Eq. 322) commented on. Cullerne *v.* London and Suburban General Permanent Building Society - C. A. 485

—— Security for costs—Action by company in liquidation - - - - 235
*See* Practice. 9.

CONFLICT OF LAWS—Foreign bankruptcy or liquidation—Discharge by—Lex loci contractus—Law of domicil—Stay of proceedings - - - - 399
*See* Contract.

CONTRACT—*Conflict of Laws—Foreign Bankruptcy or Liquidation, Discharge by—Lex Loci Contractus—Law of Domicil—Stay of Proceedings—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 5, *s.* 39.] A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled. Gibbs & Sons *v.* La Societe Industrielle et Commerciale des Métaux - - C. A. 399

COPYRIGHT—*Works of Art—What Drawings may be the subject of Copyright—Absence of Artistic Merit—Registration—Author—Copyright* (*Works of Art*) *Act*, 1862 (25 & 26 *Vict. c.* 68).] The plaintiffs were a firm of printers. J., a member of the firm, conceived the idea of printing and publishing cards bearing a representation of a hand holding a pencil in the act of completing a cross within a square, with a view to such cards being used at parliamentary and other elections for the guidance and instruction of illiterate voters in the marking of their ballot papers. J., being unable to draw, employed an artist in the service of the firm to make, under his directions, a drawing of the representation above described. The plaintiffs registered the drawing under the Copyright (Works of Art) Act, 1862, and in the memorandum stated J. to be the author of the drawing. Subsequently the defendants published similar cards with a hand holding a pencil in the act of completing a cross in a particular square of a voting paper. The hand on the defendants' cards was in a slightly different position, but the idea was taken from the plaintiffs' cards. Neither the plaintiffs' nor the defendant's draw-

**COPYRIGHT**—*continued.*
ings were of any artistic merit:—*Held*, that an action for infringement of copyright could not be maintained, on the grounds: 1. That the plaintiffs' drawing was so far not the subject of copyright that it was not entitled to protection against an imitation which was not an exact reproduction; 2. That J. was not the author of the drawing, and that the registration was consequently void. KENRICK & CO. *v.* LAWRENCE & CO. - 99

**COSTS**—Mortgagee—Solicitor—Profit Costs 176
*See* MORTGAGE.

**COUNTY COUNCIL**—Transfer of administrative business of quarter sessions—Transfer of property of justices—Debt and liabilities of justices—Liability to be sued - 384
*See* LOCAL GOVERNMENT.

—— Executive committee—Delegation of powers to sub-committee — Meaning of word "delegation" - - - 391
*See* LOCAL GOVERNMENT. 2.

—— Main roads—Footways, maintenance and repairs of, in urban sanitary districts
*See* HIGHWAY. 3. [450

**COUNTY COURT**—*Reduction of Claim by "admitted Set-off"—Admission of Plaintiff only—Jurisdiction—51 & 52 Vict. c. 43, s. 57.*] By the County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 57, where in any action the debt or demand claimed consists of a balance not exceeding 50*l.* after an "admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff," the Court shall have jurisdiction to try such action:—*Held*, that the "set-off" referred to in the section is a set-off the existence of which is admitted by both parties, and not merely by the plaintiff. HUBBARD *v.* GOODLEY - 156

2. —— *Practice—Prohibition—Want of Jurisdiction—Action in wrong Court—Appearance by Defendant—Waiver of Objection—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43). *ss.* 74, 114.] The plaintiffs commenced an action against the defendant in a county court, within the district of which the defendant had carried on business within six months before the commencement of the action, but did not dwell or carry on business at the time of commencing the action. Leave to sue in that Court had not been obtained. The defendant appeared, and the case was heard and partly determined and adjourned to a future day. At the second hearing the defendant for the first time objected to the jurisdiction of the Court. The judge held that the defendant, by appearing and contesting the action, had waived the objection. The defendant applied for a prohibition:—*Held*, that the objection to the jurisdiction was one which could be waived, and that the defendant had waived it, and was not entitled to a prohibition.—*In re Jones* v. *James* (19 L. J. (Q.B. 257) followed. MOORE *v.* GAMGEE - 244

—— Landlord and tenant—Rent in arrear—Execution against goods of third party—Right of landlord to claim for arrears of rent - - - - 306
*See* LANDLORD AND TENANT. 2.

—— Admiralty—Jurisdiction—Action in rem for wages—Maritime lien of mate for wages earned in port - - 339
*See* ADMIRALTY.

**COVENANT**—"Good tenantable repair"—Lease
*See* LANDLORD AND TENANT. [42

**CRIMINAL LAW**—*Evidence of Girl not given upon Oath—Attempt to have unlawful Carnal Knowledge of Girl under Thirteen—Indecent Assault—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *ss.* 4, 9—24 & 25 *Vict. c.* 100, *s.* 52.] On an indictment in two counts, the first charging the prisoner under s. 4 of the Criminal Law Amendment Act, 1885, with an attempt to have carnal knowledge of a girl under thirteen, the second charging him with indecent assault, the evidence of the girl, though not given on oath, was received in accordance with s. 4 of the Criminal Law Amendment Act, 1885, and was corroborated by other material evidence as therein required.—The judge held that there was no evidence of the offence charged in the first count, but that with respect to the charge of indecent assault, though the sworn evidence was in itself insufficient, the unsworn evidence, if admissible, and the sworn evidence taken together, constituted sufficient evidence to be left to the jury, and he directed the jury to take into consideration both the unsworn and the sworn evidence. The jury convicted the prisoner:—*Held*, that the unsworn evidence of the girl received as above stated was not admissible in support of the charge of indecent assault, and that the conviction must be quashed.—*Reg.* v. *Wealand* (20 Q. B. D. 827) considered. THE QUEEN *v.* PAUL - - - C. C. R. 202

**DAMAGES**—*Measure of—Contract—Wrongful Dismissal of Apprentice—False Charge of Misconduct.*] By a deed of apprenticeship the plaintiff bound himself as apprentice to the defendants to learn the business of a draper for the term of four years from May, 1887, and the defendants covenanted to instruct the plaintiff and provide him with food and lodging during that term. It was provided by the deed that, if during the term the plaintiff shewed want of interest in his work it should be lawful for the defendants to cancel the deed upon giving him a week's notice. In October, 1888, the defendants summarily and without any notice dismissed the plaintiff, assigning as the reason of his dismissal that he had been guilty of frequent acts of insubordination, and had gone out at night without permission.—The plaintiff having brought an action for wrongful dismissal in breach of the apprenticeship deed, the jury found that he had not been guilty of the misconduct imputed, and that no grounds existed justifying the defendants in dismissing him without notice, but that grounds did exist which would have justified them in dismissing him with a week's notice. On the question of the measure of the damages to which the plaintiff was entitled under those circumstances, the judge directed the jury that, although they might take into consideration as an element in the case the fact that the defendants would have been justified in dismissing the plaintiff with a week's notice, they were not bound to limit the damages to the value of the week's notice which he had lost:—*Held*, that this was no misdirection. MAW *v.* JONES - - - - - 107

**DEBENTURE**—Bill of sale—Registration 300
*See* BILL OF SALE. 5.

**DELIVERY**—Gift—Passing of property to donee
*See* GIFT. [57

**DEMURRAGE**—Bill of lading—Charterparty—Liability of consignee for delay occasioned by a strike - - - 320
*See* SHIP.

**DENTIST**—*Dentists Act*, 1878 (41 & 42 *Vict. c.* 33), *s.* 11 (5) *and* 13—*Discretionary and quasi judicial functions—Ministerial Act—Erasing name from Dentists Register, liability to Action for—Erroneous exercise of Discretion without Malice.*] Under the Dentists Act, 1878, s. 11, a register is to be kept by the general registrar to be styled the dentists register; and by sub-s. (5) of the section, every registrar is in all respects in the execution of his discretion and duty in relation to any register under the Act to conform to any orders made by the General Council under the Act and to any special directions given by the General Council. By s. 13 of the Act power is given to the General Council (inter alia) to cause the name of a person who has been guilty of infamous or disgraceful conduct in a professional respect to be erased from the register.—The plaintiff's name had been entered on the dentists register in respect of a diploma in dental surgery conferred upon him by the Royal College of Surgeons in Ireland Such diploma was afterwards withdrawn on the ground that the plaintiff had advertised in connection with his profession in breach of an undertaking not to do so given by him when his diploma was granted. The defendants, the General Council, on being informed of such withdrawal, and its cause, without calling on the plaintiff for explanation, directed the registrar to remove the plaintiff's name from the dentists register. On an application for a mandamus to restore his name, it was held that the defendants had acted erroneously and that his name must be restored. The plaintiff then brought his action for wrongfully removing his name from the register:—*Held*, that the functions exercised by the General Council under the abovementioned sections respectively being discretionary, not merely ministerial, whether they acted under s. 13 or under s. 11, sub-s. 5, only, they were not liable to an action for the erroneous exercise of their discretion in the absence of mala fides. PARTRIDGE *v.* GENERAL COUNCIL OF MEDICAL EDUCATION AND REGISTRATION OF THE UNITED KINGDOM - - - - - C. A. 90

**DIPLOMA** — Dentists register— Withdrawal of diploma of licentiate by medical authority - - - - - 90
*See* DENTIST.

**DIRECTOR**—Building society—Act ultra vires—Liability for act of co-directors - 485
*See* COMPANY. 3.

**DISCHARGE**—Bankrupt—Power of Court to refuse, suspend, or impose conditions—Circumstances to be taken into consideration - - - - 285
*See* BANKRUPTCY. 3.

**DISCOVERY**—Persons not parties to the proceedings - - - - 194
*See* PRACTICE. 3.

**DRAWING**—Copyright—Work of art - 99
*See* COPYRIGHT.

**EASEMENT**—*Air—Prescription—Right to Passage of Air through defined Channel.*] The cellar of the plaintiffs' public-house was ventilated by means of a shaft cut therefrom through the rock into a disused well situated in an adjoining yard, owned and occupied by the defendant, the air from the cellar passing through the shaft and out at the top of the well. The cellar had been so ventilated for forty years at least, without interruption, and with the knowledge of the occupiers of the yard:—*Held*, that the plaintiffs could legally claim, as against the defendant, the easement of the free passage of air from the cellar; and that a lost grant of the right ought to be inferred. HASS AND ANOTHER *v.* GREGORY - 481

**ECCLESIASTICAL LAW**—*Churchwarden—Maintenance of Disused Churchyard or Burial-Ground—Repayment of Costs and Expenses—Certificate of Churchwarden—Burials Act*, 1855 (18 & 19 *Vict. c.* 128), *s.* 18.] By s. 18 of the Burials Act, 1855, the duty of maintaining disused churchyards and burial-grounds, and repairing the walls and fences thereof, is cast upon the churchwardens or burial-board, as the case may be; and it is further provided that "the costs and expenses shall be repaid by the overseers upon the certificate of the burial board or churchwardens out of the poor rate." A vestry passed a resolution to the effect that certain disused churchyards and burial-grounds in the parish should be maintained and the walls repaired by the churchwardens, the expenses of the maintenance and repair incurred by them to be paid to them by the vestry. Subsequently the vestry sanctioned extensive alterations to the walls of a burial-ground, and the senior churchwarden, acting upon such sanction, obtained tenders for the work and entered into contracts, by which he rendered himself liable for the costs of the alterations. Before the contracts were actually signed or any money paid under them by the churchwarden, he sent to the vestry a letter or precept requiring the payment of a sum of money within the amount for which he had made himself liable under the contracts:—*Held*, that the vestry were bound to pay to the churchwarden the amount of expenses for which he, acting under their authority, had rendered himself liable, although not actually paid by him:—*Held*, further, that a letter or precept written by the churchwarden, and stating the sum required, was a sufficient certificate within the meaning of the section. THE QUEEN *v.* VESTRY OF ST. MARY, ISLINGTON - 523

**ELEPHANT**—Mischievous animal—Animal ferae naturae—Liability of owner—Scienter
*See* MISCHIEVOUS ANIMAL. [258

**EMPLOYERS LIABILITY ACT**, 1880, s. 1, sub-s. 3—Master and servant - - 193
*See* NEGLIGENCE.

**ESTOPPEL**—Act ultra vires—Representation as to credit or ability—Signature of party to be charged - - 77, 512
*See* COMPANY. 1, 2.

**EVIDENCE**—*Witness—Refusal to disclose Nature or Source of Information—Director of Public Prosecutions—Prosecution of Offences Acts*, 1879 *and*

**EVIDENCE**—*continued.*

1884 (42 & 43 *Vict. c.* 22; 47 & 48 *Vict. c.* 58).] A prosecution instituted or carried on by the Director of Public Prosecutions is a public prosecution, and the Director of Public Prosecutions, if called as a witness at the trial or during any proceedings arising out of the trial, is entitled to refuse to disclose the names of persons from whom he has received information and the nature of the information received, unless upon the trial of a prisoner the judge is of opinion that the disclosure of the name of the informant, or of the nature of the information, is necessary or desirable in order to shew the prisoner's innocence. MARES *v.* BEYFUS - - - - - - C. A. 494

—— Criminal Law Amendment Act, 1885—Unsworn evidence - - - 202
*See* CRIMINAL LAW.

**EXECUTION**—County Court—Rent in arrear—Execution against goods of third party—Right of landlord to claim for arrears of rent - - - - - 306
*See* LANDLORD AND TENANT. 2.

**FISHERY**—*Fishery Acts—Fresh Water Fishery—Enforcement of Act—Offence against Act—Board of Conservators—Exclusive Right to Prosecute—* 28 & 29 *Vict. c.* 121, *s.* 27, *sub-ss.* 2, 4, *s.* 35—36 & 37 *Vict. c.* 71, *ss.* 36, 62—41 & 42 *Vict. c.* 39, *s.* 7.] The appellant was summoned for fishing without a licence, in a fishery district subject to a board of conservators, upon the information and complaint of the respondent, a duly appointed water-bailiff in the employment of the board. It was not proved that the respondent was authorized by the board to institute the proceedings:—*Held*, upon a case stated by justices, that the penalty for the offence could only be recovered by the board of conservators, and therefore the respondent was not entitled to institute the proceedings, and the appellant was not liable to be convicted. ANDERSON *v.* HAMLIN - - 221

**FOREIGN JUDGMENT**—*Action to enforce—Defence alleging Fraud—Re-trial of the Case on its Merits.*] Where an action is brought in England to enforce a foreign judgment, the defendant may raise the defence that the judgment was obtained by the fraud of the plaintiff even though the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign Court.—*Abouloff* v. *Oppenheimer* (10 Q. B. D. 295) discussed and followed. VADALA *v.* LAWES - - - - - C. A. 310

**FRAUD**—Principal and agent—Agent bribed to induce principal to enter into contract with briber—Recovery of bribes from agent—Subsequent action against briber [363
*See* PRINCIPAL AND AGENT.

**GIFT**—*Chattel capable of Delivery—Passing of Property to Donee.*] A gift of a chattel capable of delivery, made per verba de presenti by a donor to a donee, and assented to by the donee, whose assent is communicated to the donor, does not pass the property in the chattel without delivery. COCHRANE *v.* MOORE - - - C. A. 57

**HIGHWAY**—*Liability to Repair ratione tenuræ—Turnpike Trust—Alteration of Road by Trustees*

**HIGHWAY**—*continued.*

*—Expiration of Trust—Indictment against Owner not in occupation of Land—Alteration of Highway.*] An owner of lands who is not the occupier of them cannot be charged ratione tenuræ with the repair of a common highway.—When a highway repairable ratione tenuræ is, under statutory powers, so altered in its nature and course as to be practically destroyed, the liability to repair ratione tenuræ ceases.—A highway which had been from time immemorial repaired ratione tenuræ was paved to the width of nine feet in the centre with stone got from the land charged with the repair. The trustees under a Turnpike Act converted the highway into a macadamized road by taking up the old pavement and laying down to the width of fifteen feet in the centre stone brought from places without the county, and they stopped and diverted the course of the highway in parts so as to straighten it. On the expiration of the turnpike trust, the defendant, the owner of the land charged, who was not in occupation of it, was indicted and convicted for non-repair of the road ratione tenuræ:—*Held*, first, that the defendant, not being the occupier of the land, was not liable; secondly, that the road, the subject of repair, must be taken to have been destroyed, and that the liability to repair ratione tenuræ had therefore ceased. THE QUEEN *v.* BARKER - - - - C. C. R. 213

2. —— *Wilful obstruction—Summons before Justice—Dismissal of Charge—Appeal to Quarter Sessions*—5 & 6 *Wm.* 4, *c.* 50, *ss.* 72, 105.] By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), s. 72, a penalty is imposed on any person who shall wilfully obstruct a highway, and by s. 105 "if any person shall think himself aggrieved by . . . any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person in pursuance of this Act . . . such person may appeal" to quarter sessions, in manner prescribed.—A summons under s. 72 against a person for wilfully obstructing a highway was dismissed by a justice:—*Held*, that the informant had no right of appeal under s 105 against the acquittal of the accused. THE QUEEN *v.* KEEPERS OF THE PEACE AND JUSTICES OF COUNTY OF LONDON - - - - 357

3. —— *Main Roads—Footways, Maintenance and Repair of, in Urban Sanitary Districts—Highways and Locomotives (Amendment) Act,* 1878 (41 & 42 *Vict. c.* 77), *s.* 13—*Local Government Act,* 1888 (51 & 52 *Vict. c.* 41), *s.* 11.] By s. 11 of the Local Government Act, 1888, every road in a county, which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878, if repairable by the highway authority, shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate, and such council, for the purpose of the maintenance, repair, improvement, and enlargement of and other dealing with such road, shall have the same powers and be subject to the same duties as a highway board:—*Held*, that this section imposed upon the county council the duty of maintaining and repairing, in an urban sanitary district, the footways at the sides of disturnpiked roads which were constituted main

**HIGHWAY**—*continued.*
roads by s. 13 of the Highways and Locomotives (Amendment) Act, 1878. IN RE LOCAL BOARD OF WARMINSTER AND COUNCIL OF COUNTY OF WILTS - - - - - 450
—— Difference between tramway company and road authority—Reference to referee appointed by the Board of Trade 427
*See* TRAMWAY.

**HIRING AND PURCHASE AGREEMENT**—Bill of sale - - - - - 27
*See* BILL OF SALE.

**HOSPITAL OR CHARITY SCHOOL**—Inhabited house duty—Exceptions - - 121
*See* REVENUE.

**HUSBAND AND WIFE**—*Married Woman—Second Marriage—Debts contracted before Marriage—Restraint upon Anticipation—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *ss.* 13, 19.] By s. 13 of the Married Women's Property Act, 1882, a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for "all debts contracted by her before her marriage." By s. 19, nothing in this Act shall affect any settlement made respecting the property of any married woman, or render inoperative any restriction against anticipation; but no restriction made in any settlement of a woman's own property to be made or entered into by herself shall have any validity against "debts contracted by her before marriage."—Judgment for a sum of money was recovered against a married woman, who subsequently obtained a dissolution of her marriage, and married again; and by settlement made by her on the second marriage property belonging to her was settled to her separate use without power of anticipation:—*Held*, that the judgment debt was a "debt contracted before her marriage" within the meaning of s. 13, so that the defendant continued to be liable for it after her second marriage; and also that it was a "debt contracted before marriage" within the meaning of s. 19, so that the restriction upon anticipation contained in the settlement had no validity against it. JAY *v.* ROBINSON C. A. 467
—— Innkeeper—Lien on goods of guest—Credit given to husband—Lien on separate property of wife - - - 491
*See* INNKEEPER.

**INCOME TAX**—Deduction on life insurance—Insurance company abroad - 129
*See* REVENUE. 2.
—— Revenue—Annuities payable out of profits or gains - - - - 351
*See* REVENUE. 3.

**INDECENT ASSAULT**—Unsworn evidence—Criminal Law Amendment Act, 1885
*See* CRIMINAL LAW. [202

**INDICTMENT**—Highway—Liability to repair ratione tenure—Owner not in occupation of land - - - - 213
*See* HIGHWAY.

**INFORMATION**—Fishery Acts—Water-bailiff—Right to prosecute - - 221
*See* FISHERY.

**INHABITED HOUSE DUTY**—Exemptions—Hospital or charity school - 121
*See* REVENUE.

**INNKEEPER**—*Lien on Goods of Guest—Credit given to Husband—Lien on separate Property of Wife.*] The defendants, husband and wife, stayed at the plaintiffs' hotel; the wife had with her a quantity of luggage, which was her separate property; credit was given to the husband, who made payments on account. The balance of the plaintiffs' bill not being paid, the plaintiffs detained the wife's luggage in the alleged exercise of their right of lien:—*Held*, that the plaintiffs were entitled to a lien upon the goods, notwithstanding that they were the separate property of the wife. GORDON *v.* SILBER - - 491

**INSURANCE (LIFE)**—Income tax—Deduction of premium—Foreign company - 129
*See* REVENUE. 2.
—— Annuities payable out of profits or gains—Income tax - - - - 351
*See* REVENUE. 3.

**INSURANCE (MARINE)**—*Proximate Cause of Loss—"Damage consequent on Collision"—Repairs—Damage to Cargo by delay and handling.*] Goods were insured by a marine policy against (among other things) damage consequent on collision. The ship in which they were shipped came into collision with another ship, and was thereby damaged, so as to render it necessary for her to go into a port for repairs. For the purpose of such repairs it was necessary to discharge a portion of the goods insured. When the repairs were completed, such goods were re-shipped, and the ship proceeded to her destination. On arrival it was found that the goods, being of a perishable nature, had been damaged by the handling necessary for their discharge and re-shipment and by the delay. In an action by the insured upon the policy to recover the amount of the damage to the goods:—*Held*, that the collision was not the proximate cause of the loss, and therefore the plaintiffs could not recover. PINK *v.* FLEMING - - - - C. A. 396

**INTERROGATORIES**—Penal action—Fraudulent removal of goods by tenant—Action for double value - - - 232
*See* PRACTICE. 8.

**JURISDICTION**—County court—Action in wrong Court—Appearance by defendant—Waiver of objection - - 244
*See* COUNTY COURT. 2.
—— Justices—Complaint to justices—Summons issued by another justice - - 249
*See* ADULTERATION.

**JUSTICES**—Jurisdiction—Complaint to justice—Summons issued by another justice 249
*See* ADULTERATION.

**LANDLORD AND TENANT**—*Lease—Covenant—"Good Tenantable Repair," What is.*] Under an agreement to keep a house in "good tenantable repair," and so leave the same at the expiration of the term, the tenant's obligation is to put and keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it. PROUDFOOT *v.* HART - - C. A. 42

**LANDLORD AND TENANT**—*continued.*

2. —— *Rent in Arrear—Execution against Goods of Third Party—Right of Landlord to claim for Arrears of Rent- County Courts Act,* 1888 (51 & 52 *Vict. c.* 43), *s.* 160] By 51 & 52 Vict. c. 43, s. 160, when goods in a tenement for which rent is due are taken in execution under the warrant of a county court, the landlord may claim the rent due to him by delivering a notice to the bailiff making the levy, and such bailiff shall, in making the levy, in addition thereto distrain for the rent so claimed.—Execution having issued upon a judgment in a county court against the defendant, goods belonging to him were taken in execution in a house of which the wife of the defendant was the lessee. The landlords gave to the bailiff making the levy a notice under s. 160 claiming arrears of rent due from the wife:—*Held*, that, as the defendant's goods were rightfully taken in execution, the claim of the landlords was good. HUGHES *v.* SMALLWOOD [306

—— Fraudulent removal of goods by tenant—Action for double value — Interrogatories - - - - 232
*See* PRACTICE. 8.

—— Mortgage—Attornment clause—Bill of sale
*See* MORTGAGE. 2. [279

**LEASE**—Covenant—"Good tenantable repair"
*See* LANDLORD AND TENANT. [42

**LIBEL**—Staying proceedings—Second action for same publication—Res judicata - 1
*See* PRACTICE.

**LIEN**—Recovery of specific property other than land—Security—Payment into Court
*See* PRACTICE. 2. [13

—— Innkeeper—Lien on goods of guest—Husband and wife—Credit given to husband—Lien on separate property of wife - - - - - 491
*See* INNKEEPER.

**LIMITATIONS**—*Special Contract for Payment of Money—Conditions precedent to Cause of Action—Administrator—Onus of Proof—Statute of Limitations* (21 *Jac.* 1, *c.* 16), *s.* 3.] A. lent money to a building society upon the terms, in writing, that the sum lent should be repayable after the lender had given notice of his intention to withdraw it, and that no money would be paid out by the society, except on production, by the lender personally or by some one with his written authority, of a loan pass-book given to him when the loan was made:—*Held*, by Lord Esher, M.R., Lindley and Lopes, L.JJ., that the condition as to the production of the book was a condition precedent to the liability of the society to repay the money; so that, until that condition had been complied with, the Statute of Limitations did not begin to run against the lender.—By Lord Esher, M.R., and Lindley, L.J.:—If a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to shew whether he died before or after the moment when the debt became payable, the Statute of Limitations does not run against his administrator until letters of administration have been taken out. ATKINSON *v.* BRADFORD THIRD EQUITABLE BENEFIT BUILDING SOCIETY - - - C. A. 377

**LOCAL GOVERNMENT**—*County Council—Transfer of Administrative Business of Quarter Sessions—Transfer of Property of Justices—Debts and Liabilities of Justices—Liability of Council to be Sued—Contagious Diseases (Animals) Acts,* 1869, 1878 (32 & 33 *Vict. c.* 70; 41 & 42 *Vict. c.* 74).] The justices of a county, as the local authority for the county, neglected between the years 1869 and 1878 to recoup to the plaintiffs, as the local authority for a borough within the county, the proportionate amount contributed by the borough to the expenses incurred by the local authority of the county, in carrying out the provisions of the Contagious Diseases (Animals) Act, 1869, which they were bound to repay under s. 97 of that Act. After the passing of the Local Government Act, 1888, the plaintiffs sued the defendants, as successors of the local authority for the county, to recover the sums which should have been recouped:—*Held*, that the only remedy against the justices would have been by mandamus to them to pay the amounts claimed out of moneys in their hands, or to levy a rate for the purpose; and that, as the Local Government Act, 1888, vests in the County Council the property of the justices for the county subject to the same conditions and restrictions as if the Act had not been passed, the defendants were not liable in the action:—*Held*, also, that if any action would lie it would be an action on the case and not an action for debt on a statute, and therefore the Statute of Limitations was a bar to the claim. MAYOR, &c., OF COUNTY BOROUGH OF SALFORD *v.* COUNTY COUNCIL OF LANCASHIRE - C. A. 384

2. —— *County Council—Executive Committee—Delegation of Powers to Sub-Committee—Meaning of Word "Delegation"—Contagious Diseases (Animals) Act,* 1878 (41 & 42 *Vict. c.* 74), *Sched.* 6.] Under Sched. 6, clauses 5 and 6, of the Contagious Diseases (Animals) Act, 1878, a local authority may appoint an executive committee, which is to have all the powers of the local authority, except rating powers, and the executive committee may appoint sub-committees and delegate to them all or any of the powers of the executive committee with or without restrictions, and may from time to time revoke or alter any such delegation.—The duly-appointed executive committee of a county council (which, by virtue of the Local Government Act, 1888, is the local authority for the purpose of the Contagious Diseases (Animals) Acts) made an order delegating to local sub-committees its powers under the Contagious Diseases (Animals) Acts and under certain Orders in Council, including the Rabies Order, 1887. Subsequently to such delegation the executive committee, without expressly revoking the delegation, issued certain regulations under the Rabies Order, 1887, as to the muzzling of dogs and keeping them under control; no regulations under the Rabies Order, 1887, had been issued by the local sub-committee:—*Held*, that the delegation was not equivalent to a resignation by the executive committee of its own powers, that the delegated authority was subject to resumption at any time, and that the regulations were therefore valid. HUTH *v.* CLARKE - 391

—— Main roads—Footways, maintenance and repair of, in urban sanitary districts
*See* HIGHWAY. 2. [450

**MALICIOUS PROSECUTION** — Evidence — Witness—Refusal to disclose nature or source of information—Director of Public Prosecutions - - - - 494
*See* EVIDENCE.

**MARGARINE ACT**—"*Exposed for Sale*"—50 & 51 *Vict. c.* 29, *s.* 6.] By the Margarine Act, 1887 (50 & 51 Vict. c. 29), s. 6, if margarine "be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label" marked "Margarine," and by s. 4 penalties are imposed for offences against the Act.—The respondent kept margarine for sale in his shop, in a parcel which was not labelled, behind a screen, and not in sight of customers. There was no evidence that this was done for the purpose of evading the Act:—*Held*, that the margarine was not "exposed for sale" within the meaning of the Act, and the respondent was not liable to be convicted. CRANE *v.* LAWRENCE - - 152

**MASTER AND SERVANT**—Employers' Liability Act - - - - - 193
*See* NEGLIGENCE.

**METROPOLIS** — *Building Acts — Party Wall — Measurement of Height of Wall—Story—Metropolitan Building Act*, 1855 (18 & 19 *Vict. c.* 122), *ss.* 83, 85, *Sched. I.*] By Sched. I. of the Metropolitan Building Act, 1855, the thickness of the external and party walls of dwelling-houses and warehouses throughout the different stories is regulated in accordance with rules there laid down, the necessary thickness varying with the height and width of the wall; by r. 5, provision is made for the mode of measuring the height of every topmost story, and by r. 6, "the height of every wall is to be measured from the base of the wall to the level of the top of the topmost story:—*Held*, that a "topmost story" need not necessarily be contained within four vertical walls, and that floors or rooms inclosed on three sides by vertical walls and in front by the sloping roof of the house were stories within the meaning of the schedule and rules. FOOT *v.* HODGSON - - 160

**MISCHIEVOUS ANIMAL**—*Animal feræ naturæ—Liability of Owner—Scienter.*] In an action to recover damages for personal injuries sustained by the plaintiff from an elephant which was exhibited by the defendants, the jury found that the defendants did not know the elephant to be dangerous:—*Held*, that the defendants were liable, as the animal did not belong to a class which, according to the experience of mankind, is not dangerous to man, and therefore the owner kept such an animal at his own risk, and his liability for damage done by it was not affected by his ignorance of its dangerous character. FILBURN *v.* PEOPLE'S PALACE AND AQUARIUM COMPANY, LIMITED - - - C. A. 258

**MORTGAGE** — *Redemption—Mortgagee's Costs—Solicitor-Mortgagee—Profit Costs.*] A mortgagee who is a solicitor, and who in that capacity acts on his own behalf in proceedings relating to the mortgage debt or the mortgage security, cannot (in the absence of express contract) charge against the mortgagor, as part of his costs, charges, and expenses incurred as mortgagee, profit costs in respect of professional services so rendered, but will be limited to disbursements out of pocket.—*Solater* v. *Cottam* (5 W. R. 744; 3 Jur. (N.S.) 630); and *In re Roberts* (43 Ch. D. 52) approved. IN RE WALLIS. EX PARTE LICKORISH C. A. 176

2. —— *Contract—Attornment Clause—Bill of Sale—Landlord and Tenant—Bills of Sale Acts*, 1878 (41 & 42 *Vict. c.* 31), *s.* 6, *and* 1882 (45 & 46 *Vict. c.* 43), *s.* 9—*Orders III., r.* 6, *and XIV., r.* 1.] By s. 6 of the Bills of Sale Act, 1878, every attornment whereby a power of distress is given or agreed to be given by any person to any other person by way of security for any debt or advance shall be deemed to be a bill of sale, within the meaning of the Act, of any personal chattels which may be seized or taken under such power of distress; and by s. 9 of the Bills of Sale Act, 1882, a bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to that Act:—*Held*, that these enactments did not render void the ordinary attornment clause found in mortgages of real property so as to destroy the relation of landlord and tenant created by it between the mortgagee and mortgagor. MUMFORD *v.* COLLIER [279

—— Ship—Articles passing to mortgagee as part of ship - - - - 328
*See* SHIP. 4.

**NEGLIGENCE**—*Master and Servant—Employers' Liability Act*, 1880 (43 & 44 *Vict. c.* 42), *s.* 1, *sub-s.* 3.] In an action for compensation, under the Employers' Liability Act, 1880, it appeared that the plaintiff was employed by the defendant to work at a machine in a shed. A carpenter, also in the employment of the defendant, used to receive directions from him or his foreman as to the work to be done, and to give orders to the plaintiff and others as to what work each of them should do, which orders they were bound to obey; but he had no control over the plaintiff in his work. One morning the plaintiff was instructed by the carpenter as usual as to the work to be done by him. The plaintiff worked at it, and while he was working overtime in the evening the carpenter proceeded to stack timber in the shed, which was not safe for two persons to work in at the same time. By the negligence of the carpenter some of the timber fell, causing injury to the plaintiff:—*Held*, that, it not being shewn that the carpenter had any authority to tell the plaintiff where or at what time he was to work, there was no evidence of any order given by the carpenter which led to the accident, and consequently that the plaintiff was not entitled to recover.—Decision of Queen's Bench Division (24 Q. B. D. 568) affirmed. SNOWDEN *v.* BAYNES C. A. 193

**NEGOTIABLE INSTRUMENT** — Acceptance, whether qualified—Acceptance "in favour of drawer only" - - 343
*See* BILL OF EXCHANGE.

**OFFICIAL REFEREE**—Appeal—Power of Court to enter judgment - - 226, 464
*See* PRACTICE. 4, 5.

**PAYMENT INTO COURT**—Recovery of specific property other than land—Lien—Security - - - - - 13
*See* PRACTICE. 2.

**PENALTY**—Right to recover—Fishery Acts—Board of conservators - - 221
*See* FISHERY.

—— Action for—Fraudulent removal of goods by tenant—Interrogatories - 232
*See* PRACTICE. 8.

**PERSON AGGRIEVED**—Solicitor—Misconduct 17
*See* SOLICITOR.

**POOR LAW**—*Settlement—Illegitimate Child—Place of Birth—Settlement derived from living Mother—Inquiry as to Settlement of Mother—Onus of Proof*—4 & 5 *Wm.* 4, *c.* 76, *s.* 71.] On appeal against an order of removal of an illegitimate child under the age of sixteen years, whereby such child was adjudged to be settled in the place of its birth, it was admitted by the respondents that the child's mother was still living; but no evidence was given to shew that she had any settlement, nor, on the other hand, was there any evidence of failure by the respondents to make inquiries:—*Held* (affirming the judgment of the Queen's Bench Division), that, in the absence of proof that the mother had a settlement elsewhere, the burden of which proof—there being no evidence of failure by the respondents to make inquiries—was upon the appellants; the child must be deemed to be settled in the place of its birth. GUARDIANS OF HEADINGTON UNION *v.* GUARDIANS OF IPSWICH UNION - - - C. A. 143

2. —— *Settlement—Removal—Pauper aged Sixteen—Residence with Father—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35—9 & 10 *Vict. c.* 66, *ss.* 1, 3—11 & 12 *Vict. c.* 111, *s.* 1.] Notwithstanding s. 35 of the Divided Parishes Act, 1876, a child over sixteen, who is residing with its parent as part of the family, and who has no other settlement than the settlement derived from the parent at the time when it attained sixteen, is not removeable to its place of settlement if the parent is not removeable.—A child, after living in the appellant union with its father, who had acquired a settlement by residence there, removed with him into the respondent union, and while residing there with him as part of his family attained the age of sixteen and became chargeable. An order was made for the removal of the child to the appellant union. At the date of this order the father had resided for more than a year in the respondent union, and had thereby become irremoveable:—*Held*, that, notwithstanding s. 35 of the Divided Parishes Act, 1876, s. 1 of the Act 11 & 12 Vict. c. 111, applied, and, the father not being removeable, the child was not removeable. —Decision of the Queen's Bench Division (24 Q. B. D. 122) affirmed. GUARDIANS OF MITFORD AND LAUNDITCH UNION *v.* GUARDIANS OF WAYLAND UNION - - - - C. A. 164

3. —— *Settlement—Child over Sixteen—Derivative Settlement—Divided Parishes Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] In determining the settlement of a married woman, it appeared that her husband had never acquired a settlement for himself; but the birth settlements of the husband and of the husband's father were shewn:—

**POOR LAW**—*continued.*

*Held*, following the interpretation put on s. 35 of the Divided Parishes Act, 1876, in *Guardians of Reigate Union* v. *Guardians of Croydon Union* (14 App. Cas. 465), that the pauper's husband took his father's settlement, it not being derivative, and that therefore the pauper took the same settlement, and not the birth settlement of her husband. GUARDIANS OF WEST HAM UNION *v.* OVERSEERS OF ST. GILES-IN-THE-FIELDS 272

**PRACTICE**—*Staying Action—Libel—Second Action for same Publication—Res Judicata—Publication of Part of a Judicial Proceeding.*] The defendant published, in the form of a pamphlet, a report of the judgment delivered in a former action which the plaintiff had brought against him. The pamphlet contained no report of the evidence given at the trial, and there were passages in the judgment reflecting on the plaintiff's conduct. The plaintiff brought an action for libel in respect of such publication, and the jury found that the pamphlet was a fair, accurate, and honest report of the judgment, and was published without malice, and returned a verdict for the defendant. The plaintiff thereupon brought another action for libel in respect of the same publication; but he relied on other defamatory statements in the pamphlet than those set out in the statement of claim in the former action for libel. On an application to dismiss this action as frivolous and vexatious:—*Held* (reversing the judgment of the Queen's Bench Division), that the questions for the jury in the second action for libel being identical with those decided in the first, a plea of res judicata must succeed, and that the action ought to be stayed as frivolous and vexatious:—*Held*, also, that even if the plaintiff could rely in one action on one part of the pamphlet, and in another action on another part, such a course was an abuse of the process of the Court, and the second action should be stayed.—The decision of the Court of Appeal in *Macdougall* v. *Knight* (17 Q. B. D. 636), that a fair and accurate report of the judgment in an action, published bonâ fide and without malice, is privileged, although not accompanied by any report of the evidence given at the trial, discussed and approved.—*Per* Lord Esher, M.R.:—The rule of law is, that the publication, without malice, of an accurate report of what has been said or done in a judicial proceeding in a Court of justice, is a privileged publication, although what is said or done would, but for the privilege, be libellous against an individual, and actionable at his suit, and this is true although what is published purports to be and is a report, not of the whole judicial proceeding, but only of a separate part of it, if the report of that part is an accurate report thereof and published without malice. MACDOUGALL *v.* KNIGHT - - - C. A. 1

2. —— *Recovery of Specific Property other than Land—Lien—Security—Payment into Court—Order L., r.* 8.] By Order L., r. 8, where an action is brought to recover specific property other than land, and the defendant does not dispute the plaintiff's title to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Court or a judge may order that the plaintiff

**PRACTICE**—*continued.*

be at liberty to pay into Court, to abide the event of the action, "the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs as such Court or judge may direct, and that upon such payment into Court being made, the property claimed be given up to the party claiming it":—*Held* (affirming the decision of the Queen's Bench Division), that, under rule 8, in order to entitle the plaintiff to an order that the specific property be given up to him, he must pay into Court the whole amount claimed by the defendant, notwithstanding that it exceeded the value of the specific property. GEBRUDER NAF *v.* PLOTON C. A. 13

3. —— *Production of Documents—Persons not Parties to the Proceedings—Order XXXVII., r. 7.*] Rule 7 of Order XXXVII., under which the Court has power in any cause or matter "at any stage of the proceedings" to order the attendance of any person for the purpose of producing any documents which the Court may think fit to be produced, and which such person could be compelled to produce at the hearing or trial, was not made for the purpose of giving to litigants any new right to discovery against persons not parties to the proceedings, but in order to remove the difficulties which existed before the order was made in compelling the production of documents by parties at any stage of the proceedings other than the hearing or trial.—The Court has no jurisdiction to order a person not a party to the proceedings to produce a document belonging to him, unless the parties to the proceedings are entitled to the production of such document for the purpose of justice at the moment the order is made: e.g., for the purpose of a pending trial, hearing, or application, or in order to carry out or complete an order which has already been obtained. ELDER *v.* CARTER. EX PARTE SLIDE AND SPUR GOLD MINING COMPANY - C. A. 194

4. —— *Official Referee, Judgment of—Appeal—Power of Court to enter Judgment—Order XXXVI., r. 52; Order XL., r. 10; Order LIX., r. 3*] On appeal from an official referee who has ordered judgment to be entered for the plaintiff, a Divisional Court has power not only to set aside such judgment, but to enter judgment for the defendant. CLARK *v.* SONNENSCHEIN. [*See next case*] - - - - - - 226

5. —— *Official Referee, Judgment of—Appeal—Power of Court to enter Judgment—Order XXXVI., r. 52; Order LIX., r. 3*] On appeal from an official referee who has ordered judgment to be entered for the plaintiff, the Court has power not only to set aside such judgment, but to enter judgment for the defendant. CLARK *v.* SONNENSCHEIN - - - - - C. A. 464

6. —— *Appeal—Court of Appeal—Jurisdiction—"Criminal Cause or Matter"—Striking Solicitor off Rolls—Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 32—Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 19, 47.*] By s. 32 of the Attorneys and Solicitors Act, 1843, a solicitor who (inter alia) permits his name to be used in any action upon the account or for the profit of an unqualified person may upon complaint made be struck off the roll, and the unqualified person may be committed to prison for any term not exceeding one year.—An order having been made by a Divisional Court under the above section striking a solicitor off the roll:—*Held*, that the order was not made in a "criminal cause or matter" within the meaning of s. 47 of the Judicature Act, 1873, and that the Court of Appeal had therefore jurisdiction to entertain an appeal by the solicitor from the order. IN RE EEDE - - - - - - C. A. 228

7. —— *Award—Notice of Motion to set aside—Time—"Application"—Order LXIV., r. 14; Order LII., r. 1.*] By Order LXIV., r. 14, "an application to set aside an award may be made at any time before the last day of the sittings next after such award has been made and published to the parties."—By Order LII., r. 1, "where by these rules any application is authorized to be made to the court or a judge, such application, if made to a divisional court or to a judge in Court, shall be made by motion."—An award was made and published on February 27. Notice of motion to set it aside was served on May 20. The motion did not appear in the day's list for hearing during the Easter sittings, which ended on May 23, but came on to be heard afterwards:—*Held*, that the notice of motion having been given before the last day of the sittings next after the award, the "application" was within the time prescribed by Order LXIV., r. 14, and the motion was, therefore, not too late. IN RE GALLOP AND CENTRAL QUEENSLAND MEAT EXPORT COMPANY - - 230

8. —— *Interrogatories — Penal Action — Fraudulent Removal of Goods by Tenant—Action for Double Value—11 Geo. 2, c. 19, s. 3.*] An action for double the value of goods fraudulently removed by a tenant, brought under 11 Geo. 2, c. 19, is a penal action, and the plaintiff is not entitled to administer interrogatories to the defendant. HOBBS & CO. *v.* HUDSON C. A. 232

9. —— *Security for Costs—Action by Company in Liquidation—Companies Act, 1862 (25 & 26 Vict. c. 89, s. 69.*] A shareholder in a company sued the company in the Chancery Division to set aside a contract on the ground of fraud in the prospectus. While this action was pending the company sued the shareholder in the Queen's Bench Division for calls. The company was in liquidation. The shareholder applied for an order that the company should give security for costs in the action for calls:—*Held*, that the fact that the company was in liquidation shewed, in the absence of evidence to the contrary, that there was reason to believe that if the defendant should be successful in his defence the assets of the company would be insufficient to pay his costs, and therefore the defendant was entitled to security for costs under the Companies Act, 1862 (25 & 26 Vict. c. 89), s. 69. PURE SPIRIT COMPANY *v.* FOWLER - - - - 235

10. —— *Writ issued before Judicature Acts—Renewal without Leave—Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 11—Repeal—46 & 47 Vict. c. 49—Judicature Acts and Rules, Order VIII., r. 1.*] Order VIII., r. 1, as to the renewal of writs, applies to writs issued before as well as after the Judicature Act, 1875, and subsequently renewed. Where, therefore, a writ issued in 1861 was renewed in the manner pre-

**PRACTICE**—*continued.*

scribed by the Common Law Procedure Act, 1852, s. 11, until 1890, when it was served, no leave of a Court or judge to renew it having been obtained under Order VIII, r. 1:—*Held*, that the writ was no longer in force, and the service must be set aside. HUME *v.* SOMERTON - - - 239

11. —— *Appeal to Court of Appeal—Time for Appealing—"Judgment" or "Order"—Order LVIII., rr.* 3, 9, 15.] The decision of a Divisional Court upon a case stated by the Commissioners of Inland Revenue under s. 19 of the Stamp Act, 1870, is an "order," and not a "judgment," and an appeal from such decision to the Court of Appeal must be brought within twenty-one days. ONSLOW *v.* COMMISSIONERS OF INLAND REVENUE [C. A. 465

12. —— *Action against a Firm—Service of Writ on Firm—Subsequent Service on Partner—Judgment by default signed against Firm within eight days of Service on Partner — Subsequent Appearance by Partner—Right of Partner to set aside Judgment against Firm—Order IX., r.* 6; *Order XII., r.* 15; *Order XLII., r.* 10.] The writ of summons in an action against a firm was duly served upon the firm, and five days afterwards was served upon an alleged partner. Judgment by default was signed against the firm; subsequently to the signing of the judgment, but within eight days from the service of the writ upon him, an appearance was entered by the partner:—*Held*, that the partner was entitled to have the judgment against the firm set aside. ALDEN *v.* BECKLEY & CO. - - - 543

**PRESCRIPTION** — Easement — Air—Right to passage of air through defined channel *See* EASEMENT. [481

**PRINCIPAL AND AGENT**—*Fraud—Agent bribed to induce Principal to enter into Contract with Briber—Contract disadvantageous to Principal—Remedies of Principal—Recovery of Bribes from Agent—Subsequent action against Briber.*] Where an agent, who has been bribed so to do, induces his principal to enter into a contract with the person who has paid the bribe, and such contract is disadvantageous to the principal, the principal has two distinct and cumulative remedies: he may recover from the agent, as money had and received to his use, the amount of the bribe which the agent has received, and he may also in addition recover from the agent and the person who has paid the bribe, jointly or severally, damages for any loss that he may have sustained by reason of his having entered into the contract, without allowing any deduction in respect of the money recovered from the agent under the former head.—The plaintiffs were proprietors of gasworks, and it was the duty of their manager to examine tenders for the supply of coal and advise the plaintiffs thereon. The defendant, a coal merchant, submitted to the plaintiffs tenders for the supply of coal. Before submitting the tenders, and with the view of procuring the manager's recommendation of them, the defendant corruptly agreed to pay to the manager a secret commission or bribe, and, in order to recoup himself for the commission so promised, he inserted in the tenders prices which were in excess of the current market prices by the amount of the commission. The manager, being induced thereto by the promise of the commission, advised the plaintiffs to accept the defendant's tenders, which they accordingly did. The defendant delivered the coals to the plaintiffs, and was paid the prices named in the tenders. He also paid to the manager a considerable portion of the commission which he had promised. The manager received similar bribes from various other contractors, who in like manner obtained from the plaintiffs prices in excess of the market prices. The plaintiffs, upon discovery of the frauds, entered into an agreement with their manager whereby it was agreed that he should assist the plaintiffs, by giving the necessary information and evidence, to bring actions against such contractors (including the defendant) for the recovery of damages for the loss sustained by the plaintiffs in consequence of the frauds, that he should guarantee that the damages recovered in such actions should amount to a certain specified sum, that by way of security for the due performance of the guarantee he should deposit in a certain bank securities to the value of the sum guaranteed, that any sums recovered in such actions should be taken in part satisfaction of the guarantee, and that upon receipt by the plaintiffs of the full guaranteed sum they should give the manager a complete discharge. The manager duly deposited the securities in the bank. After the agreement had been entered into and the securities deposited, the plaintiffs brought an action against the defendant to recover the difference between the prices paid to him for the coal supplied and the current market prices of such coal. It was contended by the defendant that the plaintiffs' cause of action was for a tort in respect of which the defendant and the manager were joint wrongdoers, and that the agreement between the plaintiffs and the manager, coupled with the deposit of the securities by the latter, amounted to a discharge of the manager by way of accord and satisfaction, and consequently operated to discharge the defendant also:—*Held*, that the matters relied on afforded no defence to the action.—By Denman and Charles, JJ., on the ground that the discharge to which the agreement related was a discharge only of the manager's liability to hand over the bribes which he had in fact received, and was not intended as a discharge of his liability to damages for the tort which he had committed jointly with the defendant.—By Vaughan Williams, J., on the grounds that, although the agreement was, in his opinion, intended to operate as a discharge to the manager in respect of both the above-mentioned liabilities, yet, inasmuch as the plaintiffs could not consistently with their corporate duty allow the manager to retain the bribes that he had received, the agreement was void as being ultra vires, and further, that, inasmuch as the amount of the bribes to be retained by the manager was proportioned to the effect of the evidence which he gave, the agreement was void as being against public morality. MAYOR, &c., OF BOROUGH OF SALFORD *v.* LEVER - - - - 363

**PRIVILEGED PUBLICATION**—Report of proceedings in court of justice - 1 *See* PRACTICE.

**PRODUCTION OF DOCUMENTS** — Persons not parties to the proceedings - - 194
*See* Practice. 3.

**PROHIBITION**—County court—Action in wrong court — Appearance by defendant — Waiver of objection - - 244
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**PROOF**—Bankruptcy—Contingent liability 529
*See* Bankruptcy. 5.

**RAILWAY COMPANY** — *Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2, 3, 6 —*Undue Preference—Set-off in respect of Overcharges—Interest—Demand*—3 & 4 *Wm.* 4, *c.* 42, *s.* 28.] The Railway Commissioners having decided, under ss. 2 and 3 of the Railway and Canal Traffic Act, 1854, that the plaintiffs, a railway company, were giving an undue preference over the defendants' company to another company, by charging such other company lower rates for the carriage of coal to certain docks than they charged the defendants for similar traffic, the defendants sought, in an action brought against them by the plaintiffs, to set-off or counter-claim, as being overcharges, amounts by which charges paid by them to the plaintiffs under protest for such carriage of coal, previously to the decision of the Commissioners, exceeded the rates paid by the other company:—*Held*, that the case came within the decision in *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Denaby Main Colliery Co.* (14 Q. B. D. 209); that no action will lie in respect of a breach of s. 2 of the Railway and Canal Traffic Act, 1854; and, therefore, that the set-off or counter-claim failed.—A claim in the writ for interest upon the amount claimed from the date of the writ till payment or judgment is not a good demand for the purposes of 3 & 4 Wm. 4, c. 42. s. 28, which provides for the allowance of interest in certain cases "from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment." Rhymney Railway Company *v.* Rhymney Iron Company - - - - - C. A. 146

**REGISTER**—Dentists register—Withdrawal of licentiate by medical authority - 90
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**REGISTRATION**—Bill of sale—Non-renewal of registration within five years - 417
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**RENT**—Execution against goods of third party —Right of landlord to distrain for arrears of rent - - - 306
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**REPAIR**—Covenant — Lease — Good tenantable repair - - - - 42
*See* Landlord and Tenant.

**REPRESENTATION**—Representation as to credit and ability—Lord Tenterden's Act
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**REVENUE**—*Inhabited House Duty—Exemptions* —"*Hospital or Charity School*"—*School mainly self-supporting*—48 *Geo.* 3, *c.* 55, *Sched. B., Case IV.* —14 & 15 *Vict. c.* 36, *s.* 2.] By 48 Geo. 3, c. 55, Sched. B. (repealed by 4 & 5 Wm. 4, c. 19, but re-enacted by 14 & 15 Vict. c. 36) "any hospital, charity school, or house provided for the reception or relief of poor persons," is exempted from inhabited house duty. By charter granted to the founder by James I., and confirmed by statutes of 3 Car. 1, the Charterhouse was established in London as a hospital for the reception and relief of poor people, and as a free school for the maintenance and education of poor children or scholars, not to exceed forty in number; and it was a hospital and charity school within the exemption at the time of the passing of 48 Geo. 3, c. 55. In 1867, the school was removed, under statutory powers, from London to Godalming, the hospital remaining in London. In 1888 the governing body were assessed to inhabited house duty in respect of the school buildings, other than the portions occupied by the masters as their residences. The school had then become a public school numbering 500 boys. The scheme of the foundation had been altered or modified by statute by providing a limited number of scholarships and exhibitions of certain annual values to be paid out of the funds belonging to the foundation. No portion of the school buildings was set apart for the use of boys holding scholarships or exhibitions. The parents of boys not on the foundation paid large fees for their tuition and board, and by far the larger portion of the school could be carried on without the aid of the charitable foundation:—*Held*, that the liability of the governing body to pay inhabited house duty depended upon the character of the school buildings at the time of the assessment; and that the Charterhouse School, having substantially ceased to be a charity school at that time, the exemption of 48 Geo. 3, c. 55, did not apply to relieve the governing body from liability. Governors of Charterhouse School *v.* Lamarque - 121

2. —— *Income Tax—Deductions—Premium on Life Insurance—Foreign Insurance Company* —16 & 17 *Vict. c.* 34, *s.* 54—16 & 17 *Vict. c.* 91, *s.* 1.] By the Income Tax Act (16 & 17 Vict. c. 34), s. 54, provision is made for the deduction from assessments under Schedule D. of the premium paid by the person assessed for an insurance on his life with any insurance company registered as therein mentioned; and by 16 & 17 Vict. c. 91, s. 1, the benefit of the provision is extended to any person who shall have insured his life "in or with any insurance company existing on the 1st November, 1844, or in or with any insurance company registered pursuant to 7 & 8 Vict. c. 110":—*Held* (Fry, L.J., doubting), that this provision does not apply to an insurance with a foreign company, even though that company was in existence on November 1, 1844, and has an office in England. Decision of Queen's Bench Division (24 Q. B. D. 491) affirmed. Colquhoun *v.* Heddon - - - - - C. A. 129

3. —— *Income Tax—Annuities payable out of Profits or Gains—Assessment of Profits or Gains* —5 & 6 *Vict. c.* 35, *Sched. D.*, *s.* 100, *Case I.*, *Rule* 4; *s.* 102.] An insurance society granted life annuities in consideration of a single sum paid by the applicant at the time of granting the annuity, and they claimed to deduct from the amount of their profits chargeable with income

**REVENUE**—*continued.*
tax the sums paid by them in discharge of the annuities so granted:—*Held* (affirming the judgment of the Queen's Bench Division), that the annuities were paid out of "profits or gains" within the meaning of 5 & 6 Vict. c. 35, s. 102, and were, therefore, chargeable with income tax in the hands of the society by virtue of that section. GRESHAM LIFE ASSURANCE SOCIETY *v.* STYLES - - - - C. A. 351
—— Case stated by Commissioners of Inland Revenue—Appeal to Court of Appeal—"Judgment" or "order" - - 465
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**RULES**—Order III., r. 6 - - - 279
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—— Order VIII., r. 1 - - - 239
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—— Order XIV., r. 1 - - - 279
*See* MORTGAGE.
—— Order XXXVI., r. 52 - - 226, 464
*See* PRACTICE. 4, 5.
—— Order XXXVII., r. 7 - - - 194
*See* PRACTICE. 3.
—— Order XLII., r. 10 - - - 543
*See* PRACTICE. 12.
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*See* PRACTICE. 2.
—— —— r. 10 - - - 226, 464
*See* PRACTICE. 4, 5.
—— Order LII., r. 1 - - - - 230
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—— Order LVIII., rr. 3, 9, 15 - - 465
*See* PRACTICE. 11.
—— Order LIX., r. 3 - - 226, 464
*See* PRACTICE. 4, 5.
—— Order LXIV., r. 14 - - - 230
*See* PRACTICE. 7.

**SAILING RULES**—Thames navigation—Tug towing barges into dock—"Navigating" *See* SHIP. 5. [335
**SECURITY FOR COSTS**—Action by company in liquidation - - - - 235
*See* PRACTICE. 9.
**SEPARATE ESTATE**—Married woman—Second marriage—Debts contracted before marriage—Restraint upon anticipation 407
*See* HUSBAND AND WIFE.
**SERVICE**—Writ—Action against firm—Service of writ on firm—Subsequent service on partner—Judgment by default against firm - - - - - 543
*See* PRACTICE. 12.
**SESSIONS**—Appeal—Summons before justice—Dismissal of charge—Highway—Wilful obstruction - - - - 357
*See* HIGHWAY. 2.
—— Transfer of administrative business of quarter sessions—County council—Transfer of property of justices—Debts and liabilities of justices - - - - 384
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**SETTLEMENT**—Poor law - - 143, 164
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—— Poor law—Child over sixteen - 272
*See* POOR LAW. 3.
**SHARES, SALE OF**—Certification of transfer—Voucher of title - - 77, 512
*See* COMPANY. 1, 2.
**SHERIFF**—*Sheriff's Act*, 1887 (50 & 51 *Vict. c.* 55), *s.* 14 (1)—*Attachment for Debt—Debtor taken to Prison within Twenty-four Hours of Arrest—Order for Commitment under Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5.] A judgment debtor arrested by virtue of an order of commitment under s. 5 of the Debtors Act, 1869, is not a person arrested by virtue of an "attachment for debt" within the meaning of s. 14 (1) of the Sheriff's Act, 1887. Such debtor may, therefore, notwithstanding that enactment, be taken to prison within twenty-four hours of his arrest. MITCHELL *v.* SIMPSON - - C. A. 183
**SHIP**—*Bill of Lading—Charterparty—Demurrage—Fixed number of Lay-days—Liability of Consignee for Delay occasioned by a Strike, rendering it impossible for the Shipowner to perform the Ship's part of the Unloading*] A cargo was shipped under a bill of lading incorporating a clause in a charterparty which fixed the number of lay-days for unloading and allowed other days for demurrage. Neither the bill of lading nor the charterparty contained any exception of strikes. By the custom of the port of discharge cargoes were unloaded by the joint act of the shipowner and the consignees. During the lay-days a strike took place, both among the labourers employed on behalf of the ship and those employed by the consignees, with the result that the unloading ceased, and could not be resumed till some days after the expiration of the lay-days:—*Held*, that as the number of lay-days allowed for the discharge was fixed, the consignees were liable to pay demurrage, notwithstanding the inability of the shipowners owing to the strike to do their part in the unloading.—*Thies* v. *Byers* (1 Q. B. D. 244) considered. BUDGETT & CO. *v.* BINNINGTON & CO. - - - - - - 320
2. —— *Bill of Lading—Exemption of Shipowner's Liability—Injury to Cargo—Negligence.*] A bill of lading contained the following, amongst other, exemptions from the shipowner's liability for injury to cargo: "Negligence or default of pilot, master, mariners, engineers, or other persons in the service of the ship, whether in navigating the ship or otherwise, loss or damage arising from rain, storage or contact with other goods being excepted, and the ship not being liable for any consequence of the causes herein excepted, however caused or originated." The shipper's goods, after being placed on board, were injured by reason of persons, for whose acts the shipowner was responsible, negligently exposing them to rain and contact with other wet goods:—*Held*, that the words "or otherwise" in the bill of lading referred to negligence in bringing about excepted loss or damage other than loss or damage caused in negligently navigating the ship, and therefore that the shipowner was not liable. NORMAN *v.* BINNINGTON - - - 475
3. —— *Bill of Lading—Incorporation of Conditions of Charterparty in Bill of Lading.*] Goods were shipped under a charterparty and bill of

**SHIP**—*continued.*

lading, the bill of lading providing that the goods were to be delivered at the port of discharge, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted, unto order or to assigns, they paying freight for the said goods, and all other conditions as per charter, with average accustomed." In the charterparty were the following words: "Negligence clause as per Baltic Bill of Lading, 1885." Amongst the perils excepted by the Baltic Bill of Lading, 1885, were "strandings and collisions, and all losses and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners."—Owing to the negligence of the master the ship was stranded, and the goods were thereby lost. The plaintiffs, who were indorsees of the bill of lading but strangers to the charterparty, sued the shipowners for the loss of the goods:—*Held*, that the words, "all other conditions as per charter," did not incorporate in the bill of lading the exception of "strandings occasioned by the negligence of the master," and that the shipowners were liable.—*Russell* v. *Niemann* (17 C. B. (N.S.) 163) followed. SERRAINO & SONS *v.* CAMPBELL - - 501

4. —— *Mortgage—Articles passing to Mortgagee as part of Ship—Merchant Shipping Act*, 1854 (17 & 18 *Vict. c.* 104), *ss.* 66, 70, 469, 484.] A mortgage of a ship passes to the mortgagee under the word "ship" articles necessary to the navigation of the ship or to the prosecution of the adventure which were on board at the date of the mortgage and articles brought on board in substitution for them subsequently to the mortgage. COLTMAN *v.* CHAMBERLAIN - - - 328

5. —— *Sailing Rules—Thames Navigation—Tug towing Barges into Dock—"Navigating"—Watermen's and Lightermen's Amendment Act*, 1859 (22 & 23 *Vict. c. cxxxiii., ss.* 8, 100)—*Bye-law* 59.] Bye-law 59 of the bye-laws made under the Watermen's and Lightermen's Amendment Act, 1859, provides that "if any person when in charge of and navigating any steamboat on the river" Thames, within certain prescribed limits, "shall at the same time tow more than six barges . . . exceeding ten tons each, attached thereto . . . the person in charge of or navigating the same shall incur a penalty."—The appellant, the master in charge of a steam-tug, having been charged under the above bye-law, it appeared that he had collected thirty-one barges exceeding ten tons each at a point on the river within the prescribed limits immediately adjoining the entrance to a dock, made them up into a line four abreast extending along the shore from the dolphin at the dock entrance, and towed them all at the same time from the point where they were so lying into the dock:—*Held*, that he was not liable, inasmuch as in so towing the barges into the dock he was not navigating his tug on the river within the meaning of the bye-law. ROLLES *v.* NEWELL - - - - 335

—— Action in rem for wages—Maritime lien of mate for wages earned in port - 339
*See* ADMIRALTY.

**SOLICITOR**—*Misconduct—Bankruptcy—Application to Law Society by Official Receiver—Solicitors' Act*, 1888 (51 & 52 *Vict. c.* 65), *s.* 13—*Rules of January* 31, 1889—*Affidavit—Form—Evidence—Examination in Bankruptcy—Admissibility—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 17.] Under the Solicitors' Act, 1888 (51 & 52 Vict. c. 65), s. 13, and rules, the right to apply to the Committee of the Council of the Incorporated Law Society in respect of the misconduct of a solicitor is not confined to clients or persons injured by such misconduct, but may be exercised by any person who alleges that it has taken place.—So *held* by the Court of Appeal, affirming the decision of the Queen's Bench Division:—*Held*, also, by the Queen's Bench Division, that on an application under the Solicitors' Act, 1888, s. 13, against a solicitor who has been adjudicated bankrupt the notes of his public examination in bankruptcy signed by him may, by virtue of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 17, sub-s. 8, be used in evidence against him. IN RE A SOLICITOR - - - - - C. A. 17

—— Mortgage—Profit costs - - 176
*See* MORTGAGE.

—— Striking solicitor off rolls—Appeal to Court of Appeal—"Criminal cause or matter" *See* PRACTICE. 11. [228

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21 Jac. 1, c. 16, s. 3 - - - 377
*See* LIMITATIONS.

11 Geo. 2, c. 19, s. 3 - - - 232
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48 Geo. 3, c. 55, Sched. B., Case IV. - 121
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9 Geo. 4, c. 14, s. 6 - - 77, 512
*See* COMPANY. 1, 2.

9 & 10 Wm. 3, c. 15, s. 1 - - - 545
*See* ARBITRATION.

3 & 4 Wm. 4, c. 42, s. 28 - - - 146
*See* RAILWAY COMPANY.

—— —— s. 39 - - - - - 545
*See* ARBITRATION.

4 & 5 Wm. 4, c. 76, s. 71 - - - 143
*See* POOR LAW.

5 & 6 Wm. 4, c. 50, ss. 72, 105 - - 357
*See* HIGHWAY. 2.

5 & 6 Vict. c. 35, Sched. D., s. 100, Case I., rule 4, s. 102 - - - 351
*See* REVENUE. 3.

6 & 7 Vict. c. 73, s. 32 - - - 228
*See* PRACTICE. 6.

9 & 10 Vict. c. 66, ss. 1, 3 - - - 164
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11 & 12 Vict. c. 111, s. 1 - - - 164
*See* POOR LAW. 2.

11 & 12 Vict. c. 43, s. 1 - - - 249
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14 & 15 Vict. c. 28 - - - - 87
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14 & 15 Vict. c. 36, s. 2 - - - 121
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15 & 16 Vict. c. 76, s. 11 - - - 239
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16 & 17 Vict. c. 41 - - - - 87
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16 & 17 Vict c. 91, s. 1 - - - 129
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17 & 18 Vict. c. 31, ss. 2, 3, 6 - - 146
*See* RAILWAY COMPANY.
17 & 18 Vict. c. 104, ss. 66, 70, 469, 484 328
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18 & 19 Vict. c. 122, ss. 83, 85, Schod. I. 160
*See* METROPOLIS
18 & 19 Vict. c. 128, s. 18 - - - 523
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32 & 33 Vict. c. 62, ss. 4, 5 - - 182
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32 & 33 Vict c. 70 - - - - 384
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33 & 34 Vict. c. 78, ss. 33, 60 - - 427
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37 & 38 Vict. c. 42 - - - 485
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38 & 39 Vict. c. 63, s. 6 - - - 249
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39 & 40 Vict. c. 61, s. 35 - - 164, 272
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41 & 42 Vict. c. 74 - - - - 384
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42 & 43 Vict. c. 22 - - - - 494
*See* EVIDENCE.
42 & 43 Vict c. 30, s. 10 - - - 249
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*See* BILL OF SALE. 5.
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*See* CRIMINAL LAW.
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51 & 52 Vict c. 65, s. 13 - - - 17
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52 & 53 Vict. c. 49, ss 1, 27. - - 545
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**SUMMONS** — Complaint to justices — Summons issued by another justice - - 249
*See* ADULTERATION.

**THAMES**—Sailing rules — "Navigating"—Tug towing barges into dock - - 335
*See* SHIP. 5.

**TRAMWAY**—*Tramways Act* 1870 (33 & 34 *Vict. c.* 78), *ss.* 33, 60—*Road Authority—Paving—Difference between Tramway Company and Road Authority—Reference to Referee appointed by the Board of Trade.*] A municipal corporation, as being the road and local authority, proposed to alter a road within their district, upon which a tramway had been constructed by a tramway company under the Tramways Act, 1870, by taking up the existing granite pavement and laying down a wood pavement over the whole of the roadway, including the space between the rails of the tramway and eighteen inches on each side thereof.—The tramway company objected to the alteration so far as it concerned the last-mentioned portion of the roadway, and claimed to refer the matter as being a difference within s. 33 of the Tramways Act, 1870, to a referee to be appointed by the Board of Trade:—*Held*, that the difference was not one within the 33rd section, inasmuch as it was not with respect to any interference or control claimed to be exercised by the road authority "by virtue of the Act" or to "any subject or thing regulated by or comprised in the Act," but with respect to the exercise of a power which belonged to the road authority independently of the Act, and which was preserved by s. 60 of the Act. BRISTOL TRAMS AND CARRIAGE CO. *v.* MAYOR, &c., OF BRISTOL - - - - C. A. 427

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**WEIGHTS AND MEASURES** — *Sale of Coal—Coal in course of Delivery to Purchaser—Representation by Servant of Seller—Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 29.] By s. 29, sub-s. 1, of the Weights and Measures Act, 1889, "any inspector of weights and measures, or officer appointed for the purpose by the local authority, may, at all reasonable times, enter any building or part of a building or other place in which coal is sold or kept or exposed for sale, and may stop any vehicle carrying coal for sale or for delivery to a purchaser, and may test any weights and weighing instruments found in any such place or vehicle, and may weigh any load, sack, or other less quantity of coal, found in any such place or vehicle, or which is in course of delivery to any purchaser." By sub-s. 2: "If it appears to a court of summary jurisdiction that any load, sack, or less quantity so weighed is of less weight than that represented by the seller, the person selling or keeping or exposing the coal for sale, or the person in charge of the vehicle, as the case may be, shall be liable to a fine not exceeding five pounds":—*Held*, that in order to convict the seller of coal of an offence under the above section there must be an actual representation by him as to the weight of the coal sold, and that a representation made to an inspector by a servant in charge of a vehicle carrying coal for delivery to a purchaser was not of itself the representation of the master so as to make him liable under the section. ROBERTS *v.* WOODWARD 412

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